Supreme Court, U. S.
FILED
AUG 29 1979
MICHAEL RODAK, JR., CLERK

NO. 79-334

IN THE
SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1978

JOHN G. SWAINSON,
Petitioner,

-VS-

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

John H. Schomer
Attorney for Petitioner
One Jackson Square
Jackson, Michigan 49201
Telephone: (517) 787-2550

OF COUNSEL:
DYKEMA, GOSSETT, SPENCER, GOODNOW & TRIGG
35th Floor
400 Renaissance Center
Detroit, Michigan 48243

AMERICAN PRINTING COMPANY
125 WEALTHY STREET, S.E., GRAND RAPIDS, MICHIGAN 49503 — (616) 458-5326
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	12
APPENDIX A	1a
APPENDIX B	3a
APPENDIX C	5a
APPENDIX D	7a
APPENDIX E	11a
APPENDIX F	13a
APPENDIX G	15a
APPENDIX H	18a
APPENDIX I	20a
APPENDIX J	25a
APPENDIX K	28a
APPENDIX L	32a
APPENDIX M	39a
APPENDIX N	41a
APPENDIX O	43a
APPENDIX P	47a
APPENDIX Q	49a
APPENDIX R	51a
APPENDIX S	52a
APPENDIX T	61a

INDEX OF AUTHORITIES

Cases: Page

Allen v *United States*, 4 F. 2d 688 (7th Cir. 1925) ... 20

Bowen v *Eyman*, 324 F. Supp. 339 (D.C. Ariz. 1970) 21

Delaney v *United States*, 199 F. 2d 107 (1st Cir. 1952) 28

Estes v *Texas*, 381 U.S. 532, reh. den. 382 U.S. 875 (1965) 15, 27

Irvin v *Dowd*, 366 U.S. 717 (1960)..... 14, 17, 30

Marshall v *United States*, 360 U.S. 310 (1959) 14, 24

People v *Frechette*, 380 Mich. 64 (1968) 21, 22, 23

People v *Reagan*, 395 Mich. 306 (1975) 10, 26

Sheppard v *Maxwell*, 384 U.S. 333 (1966) 14, 16

State v *Britt*, 235 S.C. 395, 111 S.E. 2d 669 (1959) .. 22

State v *Driver*, 38 N.J. 255, 183 A.2d 655 (1962) 22

State v *Stiltner*, 80 Wash. 2d 47, 491 P.2d 1043 (1971) (1971) 18, 19, 30

United States v *Bletterman*, 279 F.2d 320 (2d Cir. 1960) 20

United States v *Dioguardi*, 20 F.R.D. 33 (D.C.N.Y. 1956) 19

United States v *Milanovich*, 303 F.2d 626 (4th Cir. 1962) cert. den. 371 U.S. 876 (1962)..... 20

Constitution:

Constitution of the United States, Amendment VI ... 4

Constitution of the United States, Amendment XIV, § 1 3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978
NO.

JOHN G. SWAINSON,
Petitioner,
-vs-
PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

The petitioner, JOHN G. SWAINSON, respectfully asks this court to issue a writ of certiorari to review the decision of the Michigan Supreme Court rendered in these proceedings on June 5, 1979. Due process requires that every defendant in a criminal proceeding (i) be considered innocent until proven guilty and (ii) be allowed a jury trial before an impartial jury free from bias and influence. In the instant case, erroneous statements made to the press by those in charge of the prosecution for the State concerning petitioner's alleged agreement to take a lie detector test have effectively stripped petitioner of his fundamental rights. The erroneous statements concerning the lie detector test have shifted the burden of proof from the State to petitioner. Petitioner will be confronted by a jury which will consider him guilty until he proves himself to be innocent.

OPINIONS BELOW

Michigan Supreme Court. The order denying petitioner's Application for Leave to Appeal (Appendix A, *infra*, p. 1a) is not reported.

The order denying petitioner's Motion for Rehearing (Appendix B, *infra*, p. 3a) is not reported.

Michigan Court of Appeals. The order denying petitioner's Application for Leave to Appeal (Appendix C, *infra*, p.5a) is not reported.

Circuit Court of Jackson County, Michigan. The order denying petitioner's Application for Leave to Appeal (Appendix D, *infra*, p.7a) is not reported.

District Court, 12th Judicial District. The order denying petitioner's Motion to Dismiss the Indictment filed against him (Appendix E, *infra*, p.11a) is not reported.

District Court, 13th Judicial District. The order denying petitioner's Motion to Dismiss the Indictment filed against him (Appendix F, *infra*, p.13a) is not reported.

JURISDICTION

The order of the Michigan Supreme Court was entered on April 6, 1979. Petitioner's Motion for Rehearing was denied on June 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

On November 16, 1977, petitioner was arrested and he was subsequently indicted for allegedly driving under the influence of liquor and possession of marijuana. Petitioner's arrest attracted much public attention in newspapers and on radio and television stations throughout the State of Michigan due to petitioner's status as a former Governor of the State and a former State Supreme Court Justice. Prior to petitioner's trial, the Jackson Citizen Patriot carried a front-page article, which was subsequently picked up by other newspapers in the State through the AP and UPI wire services, informing the public that petitioner's marijuana possession trial had been adjourned to allow him time to take a lie detector test. The same story was broadcast on various radio and television stations on different occasions. The

stories quoted the Jackson County, Michigan Prosecutor Edward J. Grant, as stating that petitioner would not go to trial on the marijuana charges if he passed the lie detector test. A subsequent story in the Jackson Citizen Patriot declared that petitioner had not yet taken the lie detector test his lawyers requested and that jury selection for the marijuana charge trial was adjourned to allow the former Governor to take the test. In fact, petitioner never requested a lie detector test or agreed to take one. The questions presented are:

I. Whether due process requires that every defendant in a criminal prosecution be accorded:

   (i) a trial before an unbiased and impartial jury; and

   (ii) a presumption of innocence until proven guilty?

II. Whether the numerous erroneous newspaper, radio and television reports concerning petitioner's alleged agreement to take a lie detector test:

   (i) stripped petitioner of his due process right to receive a trial before an impartial jury; and

   (ii) effectively shifted the burden of proof from the State to petitioner in spite of petitioner's constitutional right to be considered innocent until proven guilty?

III. Whether the erroneous statements made in the press concerning petitioner's alleged taking of a lie detector test created an irradicable presumption of partiality in the mind of the general public?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1:

"... nor shall any state deprive any person of life, liberty, or property without due process of law..."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

STATEMENT OF THE CASE

On November 16, 1977, petitioner was stopped by two State Police officers about 10 miles from his home in Manchester, Michigan. The officers allegedly determined that petitioner was intoxicated and arrested petitioner for the offense of driving under the influence of liquor (DUIL). Petitioner was then taken to the Jackson County, Michigan Jail where he was immediately subjected to a search which allegedly turned up a "marijuana cigarette". Petitioner was charged with the offense of DUIL and possession of marijuana and jailed overnight.

Petitioner's arrest attracted much attention in newspapers and on radio and television stations throughout the State due to his status as a former Governor of the State and a former State Supreme Court Justice. Detailed articles concerning petitioner's arrest and his past personal history appeared, for example, in the Jackson Citizen Patriot (Appendix G, *infra*, p.15a), Ann Arbor News (Appendix H, *infra*, p. 18a), Detroit News (Appendix I, *infra*, p.20a) and Detroit Free Press (Appendix J, *infra*, p.25a). Petitioner is personally aware that reports of petitioner's arrest were carried repeatedly by radio and television stations in Jackson, Lansing, Ann Arbor and Detroit, Michigan. Furthermore, reports of petitioner's arrest were also carried by newspapers and radio and television stations other than those noted here.

Between November 16, 1977 and January 11, 1978, the above-listed newspapers and radio and television stations carried articles and editorials concerning: (i) the adjournment of petitioner's trials for DUIL and possession of marijuana (Appendix K, *infra*, p.28a), (ii) an in-depth report on petitioner's life history, with particular emphasis on his previous indictment by a Federal grand jury on charges of bribery and perjury and his conviction for lying to the grand jury (Appendix L, *infra*, p.32a) and (iii) various editorials and letters pertaining to the type of newspaper coverage and justice being afforded petitioner (Appendix M, *supra*, p.39a).

On January 11, 1978, the Jackson Citizen Patriot, the only local daily paper within Jackson County, Michigan and a paper which has general circulation throughout Jackson County, carried a front-page article headlined: "Swainson will take lie test". That article erroneously informed the entire Jackson community that:

> "*Jury selection for a marijuana possession trial of John G. Swainson has been adjourned to allow the former governor to take a lie detector test.*
>
> The jury was to be selected today in 13th District Court, but Judge Robert Crary agreed to postpone the case until Swainson can take the test.
>
> *Prosecutor Edward J. Grant said if Swainson passes the test the marijuana charges will be dropped. If the polygraph does not clear Swainson, his trial will be heard during the court's April session.*" Appendix N, *infra*, p.41a. (Emphasis added.)

This article was picked up by the AP and UPI wire services and, consequently, articles regarding petitioner's supposed agreement to take a lie detector test appeared in numerous newspapers across the State of Michigan. (Appendix O, *infra*, p.43a.) Radio and television stations also picked up the story and broadcast it on several different occasions. These articles and broadcasts necessarily created the impression that petitioner had agreed to take a lie detector test and that: (i) if he passed the test he would not go to trial, but (ii) if he was not "cleared" by the lie detector test, he would go to trial.

In spite of the numerous prejudicial and erroneous articles and broadcasts, the truth is that petitioner never requested a lie detector test or agreed to take one even though offered by Jackson County Prosectuor Edward J. Grant. Prosecutor Grant, in a conference with petitioner's attorneys, John H. Schomer and James B. Falahee, Jr., offered a lie detector test on the possession of marijuana charge if petitioner wished to take one. Petitioner's attorneys told Prosecutor Grant that they would submit the offer to petitioner and would inform the Prosecutor of his response. At no time did petitioner, or either of his attorneys, get back to Prosecutor Grant and inform him that petitioner had agreed to take the lie detector test. In fact, petitioner's attorneys subsequently informed Prosecutor Grant that petitioner refused to take the proffered lie detector test. (Appendices P and Q, *infra*, pp.47a,49a.)

Even though petitioner had not agreed to take a lie detector test, Prosecutor Grant still told Mr. Nolan Finley, a reporter for the Jackson Citizen Patriot, that petitioner's trial had been adjourned to allow petitioner time to take a lie detector test and that if the lie detector test did not "clear" petitioner his trial would proceed as scheduled. In actuality, the trial on the possession of marijuana was adjourned so that it would come after the trial for DUIL; the adjournment had nothing whatsoever to do with petitioner's taking of a lie detector test.

On January 19, 1978, the Jackson Citizen Patriot carried an article entitled "Swainson is overdue on lie test". That article said, in part:

> "*John G. Swainson has not yet taken the lie detector test his lawyers requested* in asking for a postponment of his trial on possession of marijuana charges.
>
> Swainson was scheduled to appear in 13th District Court for trail this month.
>
> However, *jury selection was adjourned last week to allow the former governor to take a polygraph test.*
>
> Edward J. Grant, county prosecutor, said Swainson has not arranged to take the test. His case has been rescheduled for trial April 15. 'If I don't hear from him by then, there will be no more adjournments', Grant said. 'If the polygraph is not taken, we'll forget about it and go to trial'." Appendix R, *infra*, p.51a. (Emphasis added.)

This article, as carried by the Jackson Citizen Patriot and picked up by other newspapers and radio and television stations across the State of Michigan, served to once again reinforce in the mind of the general public the supposed fact that petitioner had agreed to take a lie detector test and that if the test did not clear him, or he did not take it, he would go to trial. The entire Michigan citizenry was thus once again led to believe that petitioner had agreed to take a lie detector test even though neither petitioner nor his attornyes had either requested or agreed to such a test. Petitioner's agreement to take a lie detector test was thus firmly implanted in the mind of the general public and would not be forgotten.

Petitioner's presumption of innocence and right to a fair trial before an impartial jury have been irreparably jeopardized by the above-mentioned newspaper articles and radio and television broadcasts. The articles have shifted the burden of proof from the State to the petitioner in this case. Prosecutor Grant, by his erroneous statements to the press, has tried this case in the newspapers and has unfairly placed upon petitioner the great burden of overcoming the inevitable presumption of guilt if he merely appears for trial on the DUIL or possession of marijuana charges. So far, Prosecutor Grant's actions have gone unremedied and he has thus been given one free chance to violate petitioner's constitutional rights.

The public undoubtedly believes that petitioner agreed to take a lie detector test in order to establish his overall guilt or innocence. The public cannot be expected to distinguish between the various charges as they apply to the test outcome: i.e., petitioner has agreed to take a lie detector test; if

he passes the test he will not go to trial; however, if petitioner does not pass the lie detector test, he will go to trial.

The inescapable conclusion is that if petitioner goes to trial on either the DUIL or possession of marijuana charge, he will be confronted by jurors that have been led to believe that petitioner would not be before them if he had been "cleared" by the lie detector test. Therefore, the jurors would go into the trial having already concluded that petitioner must be guilty or otherwise he would not be before them. As a result of the above-mentioned erroneous and prejudicial publicity, petitioner filed in both the 12th and the 13th District Courts for the County of Jackson, Michigan separate Motions to Dismiss the Indictments filed against him in each of those courts.

On March 7, 1978, Judge Robert E. Biewend of the 12th District Court issued an Order denying petitioner's Motion to Dismiss the Indictment filed against him in that cause. (Appendix E, *infra*, p.11a.) On March 28, 1978, Judge James M. Justin of the 13th District Court issued an Order denying petitioner's Motion to Dismiss the Indictment filed against him in that action, but at the same time granting petitioner's Motion for Change of Venue and stating that trial would be held on June 5, 1978 with the time and place of trial being supplied in time so that all necessary persons could arrange to be at the trial location. (Appendix F, *infra*, p.13a.)

On April 11, 1978, petitioner filed an Application for Leave to Appeal to the Circuit Court for the County of Jackson from the above Orders of the 12th and 13th District Courts. On May 30, 1978, Judge Russell E. Noble of the Circuit Court for the County of Jackson issued an Order denying petitioner's Application for Leave to Appeal in each case. (Appendix D, *infra*, p. 7a.)

On June 16, 1978, petitioner filed an Application for Leave to Appeal to the Michigan Court of Appeals from the Order of the Circuit Court for the County of Jackson. On

July 26, 1978, the Court of Appeals issued an Order denying petitioner's Application for Leave to Appeal and at the same time denied respondent's motion to terminate the stay of proceedings heretofore entered in the cause below. As part of the Court of Appeals' Order of July 26, 1978, Judge Michael J. Kelly cautioned the Jackson County Prosecuting Attorney to adhere to the canon of professional responsibility regarding trial in a criminal matter, DR 7-107, especially those portions thereof prohibiting extrajudicial statements disseminated by means of public communication that exceed the limits contained therein. (Appendix C, *infra*, p.5a.)

It is obvious that each of the courts which has had the opportunity to rule on petitioner's Motion to Dismiss the Indictment and/or Application for Leave to Appeal has denied the same, but at the same time has either questioned or criticized the prosecution's actions in this case. Furthermore, the lower courts, in ruling as they did, expressed concern over the appropriate resolution of the issues. For example:

a) Judge Robert E. Biewend of the 12th District Court recognized that petitioner had a serious problem due to the adverse publicity, noted that such publicity cannot be too seriously condemned and then said:

> "And I personally wouldn't mind in the least having a higher Court lend its thinking or wisdom to the decision . . . I wouldn't mind at all having some higher Courts render their opinions . . . If the higher Courts can come up with any solution to it, I would sure appreciate and welcome their efforts to try it." (Appendix S, *infra*, p.58a.)

b) Judge James M. Justin of the 13th District Court denied petitioner's Motion to Dismiss because the court found no case which used the remedy sought by Defendant. In reaching its decision, the court noted:

> "[T]his Court must reject the request of the Defendant at this stage of the proceedings, just as it would

have to question any existence of a logical basis for the Supreme Court's comments on page 313 of *People* v *Reagan*, 395 Mich 306 (1975), regarding when a polygraph examination should be given. A lack of practical experience and understanding of the operation of the criminal justice system is displayed by the four justices signing the majority opinion when they say:

'Ordinarily, dispositional use of polygraph test results should not occur after judicial proceedings have been instituted.'

In many cases, a suspect has no interest in submitting to such an examination prior to the institution of judicial proceedings (the issuance of a warrant). To not understand this is to suffer from a lack of balance between high theory and pragmatism." (Appendix F, *infra*, p.13a.)

Subsequent to entering the above Order, the 13th District Court granted petitioner's request for a change of venue, even though the court admitted that it was not at all convinced that a jury of six persons from the City of Jackson, Michigan who had never heard of petitioner could not be found.

c) Judge Russell E. Noble of the Circuit Court for the County of Jackson, Michigan denied petitioner's Application for Leave to Appeal but at the same time noted that the pretrial publicity had been unfortunate and stayed all proceedings in the matter pending appeals to the Michigan Court of Appeals and the Michigan Supreme Court.

d) The Michigan Court of Appeals also denied petitioner's Application for Leave to Appeal, but yet it also denied the prosecution's motion to terminate the stay of proceedings and, through Judge Michael J. Kelly, as noted above, cautioned the Jackson County Prosecutor to adhere to the canon of professional responsibility, DR 7-107, regarding the prohibition of extrajudicial statements.

Various newspaper articles and radio and television reports pertaining to petitioner's Motion to Dismiss and the appeals of that Motion's denial have been disseminated to the Michigan public. (Appendix T, *infra*.) These articles reinforced in the mind of the general public the supposed fact that petitioner had agreed to take a lie detector test and that if the test did not clear him or he did not take it he would go to trial.

In the instant case, the prosecution has stripped petitioner of his constitutional rights via adverse and prejudicial pretrial publicity. However, none of the courts below have granted petitioner the remedy he requests herein, instead they have refused to confront the matter of the denial of petitioner's constitutional rights. Petitioner requests that this Court apply the decisions of lower courts concerning the harmful effect of the mere mention of polygraph examinations to the instant case and rule accordingly.

At each and every stage of the proceedings in this case, petitioner has continually argued that he has been and will be denied his rights under the Due Process Clause of the Fourteenth Amendment and the right to a speedy and public trial by an impartial jury under the Sixth Amendment. Petitioner contends that the indictments filed against him in each cause should be dismissed due to the above-mentioned newspaper articles and radio and television reports concerning petitioner's supposed agreement to take a lie detector examination and the irremediable adverse effect they have had on (i) petitioner's presumption of innocence, (ii) the State's burden of proof, and (iii) petitioner's right to be tried by a jury free from the outside influence of the press. To require petitioner to be tried on the charges that have been preferred against him would be a travesty of justice and a violation of petitioner's right to a fair and impartial trial, which is guaranteed by the decisions of this Court and the Constitution of the United States to every person accused of having committed a crime.

REASON FOR GRANTING THE WRIT

The decision below violates petitioner's rights under the due process clause of the Fourteenth Amendment of the United States Constitution, and petitioner's right to a fair and impartial jury, guaranteed by the Sixth Amendment, in direct conflict with applicable decisions of this Court.

Introduction

In every criminal case the burden of proof is upon the State to prove the guilt of the defendant beyond a reasonable doubt. Due process requires that a person accused of violation of a criminal law be presumed innocent until proven guilty. This presumption is predicated on the theory that the conclusions reached in a case should be induced only by the evidence and argument in open court and not by any extrajudicial efforts. The accused must be given the opportunity for a trial by an impartial fact finder (jury) properly instructed by the court.

In the instant case, however, the State of Michigan, by means of a series of erroneous newspaper articles and radio and television reports attributed directly to the State official charged with prosecuting this action, has stripped petitioner of his constitutional right to a fair trial before an impartial jury. In short, petitioner has been subjected to a "trial by newspaper," a tactic which is severely and repeatedly condemned by this Court, and which the lower courts in this case have also condemned but have failed to grant petitioner the remedy he has requested.

We are not presented here with a situation where the State has made general comments about a case. Rather, in the instant case, the State, through the prosecutor charged with the prosecution of this case, has made erroneous, misleading and highly prejudicial statements to the press. The reports of petitioner's agreement to take a lie detector test released by the prosecutor were absolutely false. Confronted with the prosecutor's completely erroneous and highly prejudicial reports, petitioner presented motions to

dismiss the indictments filed against him in each cause. In failing to recognize the completely erroneous nature of these reports, and in failing to remedy the highly prejudicial impact of these erroneous reports, petitioner contends the Michigan courts abused their discretion, failed to adequately protect petitioner's constitutional rights and, in effect, enabled the prosecution to violate petitioner's constitutional rights, at least this one time, without a corrective remedy therefor.

I. Due process requires that every defendant in a criminal prosecution be entitled to a trial by jury. The right to a trial by jury includes the right to an unbiased and an unprejudiced jury. A trial by a jury, one or more of whose members is even possibly biased or prejudiced, is not a constitutional trial.

Every defendant in a criminal prosecution is entitled to certain basic privileges, foremost among these being defendant's right to be presumed innocent until proven guilty and his right to receive a fair trial by an impartial jury.

Recognizing a defendant's right to receive a trial by an impartial jury free from outside influence, this Court has emphasized that:

> " '[l]*egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.' Bridges* v *California*, 314 US at 271, (1941). And the Court has insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.' *Chambers* v *Florida*, 309 US 227, 236-237 (1940). '*Freedom of discussion* should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.' *Pennekamp* v *Florida*, 328 US 331, 347 (1946). *But it must not be allowed to divert the trial from the 'very purpose of a*

court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.' Cox v *Louisiana*, 379 US 559, 583 (1965) (Black, J., dissenting). *Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources.* Thus, in *Marshall* v *United States*, 360 US 310 (1959), we set aside a federal conviction where the jurors were exposed 'through news accounts' to information that was not admitted at trial. We held that the prejudice from such materials 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' At 313. At the same time, we did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles.' At 312. Likewise, in *Irvin* v *Dowd*, 366 US 717 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction holding:

'With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . ' At 728.

The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in *Patterson* v *Colorado*, 205 US 454, 462 (1907):

'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.' " (Emphasis added) Sheppard v *Maxwell*, 384 US 333, 350-351 (1966).

In determining whether or not a defendant has been denied his right to a fair trial, courts do not look for *actual* fairness in the trial proceeding, rather they look to whether or not there is a *probability* of unfairness. Speaking through Mr. Justice Black, as quoted in *Estes* v *Texas*, 381U.S.532, 543, reh. den., 382 U.S. 875 (1965), this Court held in *In Re Murchison*, 349 U.S. 133 (1959):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness . . . . [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v *United States*, 348 US 11, 14. At 136. (Emphasis supplied.)
>
> And, as Chief Justice Taft said in *Tumey* v *Ohio*, 273 US 510, almost 30 years before: 'the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. *Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.*' At 532. (Emphasis supplied.) *Estes* v *Texas*, 381 U.S. 532, 543, reh. den., 382 U.S. 875 (1965).

Petitioner contends that the erroneous statements made in the press concerning his taking of a lie detector test have deprived him of his presumption of innocence and his right to a fair trial before a fair and impartial jury. The erroneous statements made to the press by the prosecutor have definitely prejudiced petitioner. It is clear that petitioner, even before actual trial, has been denied due process as guaranteed by the Constitution of the United States and the decisions of this Court.

II. The numerous erroneous newspaper, radio and television reports concerning petitioner's supposed agreement to take a lie detector test have: (i) stripped petitioner of his due process right to receive a trial by an impartial jury free from outside influences, especially since these statements were initiated by the prosecutor, and (ii) by emphasizing that petitioner's presence before a jury was entirely dependent upon his passing of a lie detector test, effectively shifted the burden of proof from the State to petitioner in spite of petitioner's constitutional privilege to be considered innocent until proven guilty.

A. United States Supreme Court's Treatment Of Cases In Which Lie Detector Test Has Been Mentioned In Press.

This case has attracted much public attention in Michigan since petitioner is a former Governor of the State of Michigan and a former State Supreme Court Justice. Petitioner's Motion to Dismiss the Indictment in this case is not based on the general publicity surrounding this case. Rather, petitioner's Motions to Dismiss are based upon the many erroneous articles and reports which have appeared in several newspapers and been broadcast over several radio and television stations concerning his alleged agreement to take a lie detector test. Petitioner contends that because of erroneous "lie detector" articles, initiated by the prosecutor, this Court should find that petitioner's right to a fair trial has been effectively denied. The articles have unduly influenced and prejudiced the mind of the general public to such an extent that jurors selected from the general public could not reasonably be expected to be impartial.

Whenever any reference whatsoever has been made to a lie detector test in a criminal prosecution, courts have not hesitated to take whatever means they felt necessary to remedy the improper reference. For example, in *Sheppard* v *Maxwell, supra*, newspapers dramatized defendant's refusal to take a lie detector test. Front-page headlines announced that "Dr. Balks At Lie Test; Retells Story." The next day,

another headline story disclosed that defendant had "again late yesterday refused to take a lie detector test." Subsequent newspaper articles continuously reported that the Coroner was pushing defendant to take a lie detector test. The newspapers also delved into defendant's past personal life, in much the same way as the newspapers, radio and television stations have delved into petitioner's life in the instant case. This Court severely criticized the prosecution for the references to a lie detector test:

> "The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the 'evidence' disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test came directly from police officers and the Coroner. . . . The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action." 384 U.S. 333, 361.

Since the State trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community, this Court reversed the denial of Sheppard's habeas corpus petition and remanded the case to the District Court with instructions to issue the writ and order that Sheppard be released from custody unless the State put him to its charges again within a reasonable time.

In *Irvin* v *Dowd*, 366 U.S. 717 (1960), this Court voided two lower courts' judgments after finding that, similar to the facts in the instant case, a barrage of newspaper headlines, articles and pictures was unleashed against defendant during the six or seven months preceding his trial. In addition, just as in the instant case, the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in defendant's county and, furthermore, the county's radio and television stations, which likewise blan-

keted the county, also carried extensive newscasts covering the same incident. These stories revealed the details of defendant's background, including references to crimes committed by him in the past. The headlines also announced that he faced a lie detector test. This Court vacated the judgments of the Court of Appeals and the District Court as being void judgments in violation of the Constitution of the United States.

B. Effect of Prosecution's Introduction of Lie Detector Test Into Case.

The erroneous newspaper articles and radio and television reports about petitioner's taking of a lie detector test have unfairly influenced and prejudiced the public against petitioner: i.e., jurors will think that petitioner must be guilty if he appears for trial because he would not be standing trial if he had been cleared by the lie detector test. The adverse effect of the erroneous references to the lie detector test are further aggravated and amplified since they were initiated by the prosecutor on behalf of the State of Michigan. This type of prosecutorial misconduct has been criticized, condemned and quickly and adequately remedied by the courts throughout the land, but has yet to be remedied in this case.

In *State* v *Stiltner*, 80 Wash. 2d 47, 491 P.2d 1043 (1971), the prosecutor charged with representing the State of Washington was quoted in the county's only local, daily newspaper as saying that four out of five prospective defendants had voluntarily taken a polygraph test and that all four had been "cleared" by the polygraph test. The community was exposed to numerous other articles and television and radio releases as the investigation proceeded. The import of this publicity was to assure the public that the mystery of the case had been solved and the guilt determined. The court found that:

> ". . . this defendant was brought to trial in a community in which she was well known, and which had been fully advised that four out of the only five possible suspects had been cleared by scientific methods employed by the state's criminal science

> experts. . . . The trial court, in passing upon the (defendant's) motion for change of venue, found that the quoted news releases were contrary to the Guidelines and Principles for the Reporting of Criminal Proceedings . . . which guidelines discourage the reporting of results of investigative procedures, lie detector tests or handwriting examples. However, in denying change of venue, (the trial judge) based his conclusion on the fact that 'the said guidelines do not have the force of law.' This is correct, insofar as they are voluntary and neither legislatively mandated nor promulgated by rule of court. That is not to say, however, that particular violations may not also be due process violations in certain instances." 491 P.2d 1043, 1046.

In describing due process violations, the *Stiltner* court noted that the ultimate constitutional responsibility for guaranteeing a fair and impartial trial lies primarily with the judiciary, not the press.

> "Here, the astonishing fact is that the prejudicial material publicized was not the result of overzealous news gathering and reporting, but was actually released to the news media by the state." *Id.* at 1046

Commenting upon the prosecutor's introduction of the prospective defendant's taking of a lie detector test, the *Stiltner* Court said:

> " 'Fair trial' certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office, information from its records, and the expression of his own belief of guilt into the scales against the accused." *Id.* at 1047

Based on the above facts, the *Stiltner* court remanded the case to the trial court with direction to order change of venue to a more appropriate locale.

In *United States* v *Dioguardi*, 20 F.R.D. 33 (D.C.N.Y. 1956), it was charged that representatives of the Department

of Justice, including the United States Attorney, engendered the sensational news exploitation in large part by issuing public statements in such detail and intensity as to amount to a preview of the Government's case, or a "trial by a newspaper", calculated to create in the mind of the public the guilt of defendant even before trial. Commenting on this tactic by the Government, the District Court said:

> "To the extent that 'trial by newspaper' was indulged in by Federal law-enforcement officials, it is to be regretted and condemned." 20 F.R.D. 33, 34.

In *United States* v *Milanovich*, 303 F.2d 626 (4th Cir. 1962), *cert. den.* 371 U.S. 876 (1962), the special assistant to the Attorney General of the United States assigned to prosecute the case volunteered information to a local radio station concerning defendant's alleged criminal record. Referring to the prosecutor's statements, the court said:

> "Whenever it appears that shortly before a trial public news media in the community have published incompetent and prejudicial information about the case or the defendant, a duty devolves upon the trial court to make certain that the necessary conditions of a fair trial have not been impaired. . . *If the prosecutor, an officer of the court, is implicated in the dissemination of such information, the occurrence should be scrutinized with special concern.*
> . . .
> A prosecutor who supplies a radio station with adverse information to be disseminated about a defendant on the eve of trial commits a gross violation of professional propriety meriting severe condemnation." (Emphasis added) 303 F.2d 626, 629-630.

See also, *United States* v *Bletterman*, 279 F.2d 320 (2d Cir. 1960) and *Allen* v *United States*, 4 F.2d 688 (7th Cir. 1925) wherein the court noted:

> "Too frequently counsel for the government loan their evidence, or parts of it, to the press, and the case is first tried in the paper before action is begun in the courts. In so doing, the prosecutor makes a serious mistake, one that cannot be too severely condemned." 4*f*.2d 688, 697.

The prosecutor's erroneous statements to the press in the instant case are especially prejudicial in light of the fact that courts have consistently held that neither the fact of the taking of a lie detector test nor the results of such a test are admissible in evidence.

In *Bowen* v *Eyman*, 324 F. Supp. 339 (D.C. Ariz. 1970), a police officer testified that the defendant had refused to take a lie detector test. The trial court cautioned the jury to disregard the statement; however, the appellate court held that such instruction did not cure the violation of the Fifth Amendment privilege against self-incrimination. The court concluded:

> "The court does not rest solely on the privilege against self-incrimination, however. It is of the further opinion that, under the facts of this case, the *reference to petitioner's refusal to be tested was so highly prejudicial as to deny petitioner a fair trial and due process of law.*" (Emphasis added) *Id.* at 342.

See also, *U.S.* v *Jenkins*, 470 F.2d 1061 (9th Cir. 1972), cert. den. 411 U.S. 920 (1973); *U.S.* v *DeBetham*, 470 F.2d 1367 (9th Cir. 1972), cert. den. 412 U.S. 907 (1973); and *U.S.* v *Alvarez*, 472 F.2d 111 (9th Cir. 1973), cert. den. 412 U.S. 921 (1973).

In *People* v *Frechette*, 380 Mich. 64 (1968), it was testified at trial that defendant had taken a lie detector test. The trial court did not instruct the jury to disregard the numerous reports of polygraph tests or for that matter to disregard the answer of the expert as to his opinion of whether defendant was lying. Defendant contended the admission of the testimony concerning the lie detector test was error and he should therefore be granted a new trial. Defendant also contended that since all the jurors had heard radio or televi-

sion reports or read about the case in the newspapers, he was deprived of his right to a fair trial. Commenting upon the admission of defendant's taking a lie detector test, the Michigan Supreme Court quoted from *State* v *Britt*, 235 S.C. 395, 111 S.E. 2d 669 (1959). There the South Carolina court was considering lie detector tests and a situation where the testimony established that the defendant had merely refused to take a test. The court in *Britt* stated:

> "In our opinion, permitting the witness to so testify was very damaging and highly prejudicial to the appellant Britt." 111 S.E. 2d 669, 684-685.

The *Britt* trial judge then told the jury not to consider the testimony concerning lie detector tests. Of this, the South Carolina Supreme Court noted, and the Michigan Supreme Court in *Frechette* quoted with approval:

> "What effect the testimony as to the reputation of the appellant Britt and of his failure to take a lie detector test had upon the jury is only known to the members thereof. We reach the conclusion that it could have affected the verdict in this case. *When it is made to appear that anything has occurred which may have improperly influenced the action of the jury, the accused should be granted a new trial, although he may appear to be ever so guilty, because it may be said that his guilt has not been ascertained in the manner prescribed by law.*
>
> We are convinced that the testimony directing the attention of the jurors to the fact that the appellant Britt had been guilty of previous crimes, and the testimony of his refusal to take a lie detector test, *even though this testimony was finally stricken out and jury instructed to disregard the same, constitutes prejudicial error and entitles him to a new trial.*" Emphasis as is in *Frechette*. 380 Mich. at 70-71.

The *Frechette* court also quoted from *State* v *Driver*, 38 N.J. 255, 183 A.2d 655 (1962), where the prosecutor's statement to the members of the jury informed them that the defendant had refused to take a lie detector test. Of this the *Driver* court noted, and the *Frechette* court quoted with approval:

> ". . . to tell a jury of laymen at the very outset of the trial that defendant refused a number of times to take a lie detector test was to create a probable aura of prejudice which would permeate the proceeding to the very end." 380 Mich. 64, 71.

Based upon the admission of evidence in *Frechette* regarding defendant's taking of a lie detector test, the defendant was granted a new trial.

In *People* v *Reagan*, 395 Mich. 306 (1975), the Michigan Supreme Court noted that:

> "Prosecutional use of polygraph test results *at any stage of the proceedings* necessarily has the effect of supplanting the trial process.
>
> . . .
>
> *Law enforcement processes are committed to civilized courses of action. When mistakes of significant proportion are made, it is better that the consequences be suffered than that civilized standards be sacrificed.*" (Emphasis added) *Id.* at 313, 319.

Courts have not been the only bodies to criticize and condemn a prosecutor's introduction of a lie detector test into a case. For example, Disciplinary Rule 7-107 of both the American Bar Association's Code of Professional Responsibilities and the Code of Professional Responsibility and Canons in effect in Michigan provides:

> "Trial Publicity
>
> (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from

the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

. . .

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examination or tests."

Based on the above information and the decisions of lower courts, it is evident that the erroneous statements made to the press by the prosecutor concerning petitioner's alleged agreement to take a lie detector test were highly prejudicial to petitioner's right to due process and merit appropriate relief from this Court.

C. Effect of Statements Regarding Appellant's Alleged Taking of Lie Detector Test Being Made During Pretrial Proceedings.

In many of the cases cited above, reference to a defendant's taking of a lie detector test was made during the course of trial. In the instant case, statements concerning petitioner's alleged taking of a lie detector test have been made prior to trial. Petitioner contends that this fact makes it all the more probable that potential jurors have been unduly influenced and prejudiced by the erroneous statements concerning the lie detector test.

For example, in *Marshall* v *United States*, 360 U.S. 310 (1959), petitioner never took the stand, nor did he offer any evidence. A government agent testified that he was introduced to petitioner as a salesman who had difficulty staying awake on long automobile trips and that on two occasions he obtained drugs from petitioner without a prescription. Petitioner asked the trial judge to rule that there was entrapment as a matter of law. The judge refused to so hold. The government asked to be allowed to prove that petitioner had previously practiced medicine without a license as tending to refute the defenses of entrapment. The trial judge refused this offer saying:

"It would be just like offering evidence that he picked pockets or was a petty thief or something of that sort which would have no bearing on the issue and would tend to raise a collateral issue and I think would be prejudicial to the defendant." *Id.* at 311.

This Court, however, noted that, during the trial, two newspapers containing such information got before a substantial number of jurors. The trial judge, upon learning that these news accounts had reached the jurors, summoned them into his chamber one by one and inquired if they had seen the articles. After conducting this interview, the trial judge felt that there was no prejudice to petitioner and denied petitioner's motion for mistrial. This Court reversed the trial judge and granted a new trial concluding:

"*We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reached the jury through news accounts as when it is a part of prosecution's evidence. . . It may indeed be greater for it is then not tempered by protective procedures.*" (Emphasis added) *Id.* at 312, 313.

In *Estes* v *State of Texas, supra,* this Court, in commenting upon statements made prior to trial emphasized that:

"Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence." 381 U.S. 536.

In the instant case, the erroneous newspaper articles and radio and television reports concerning petitioner's lie detector test all occurred prior to the time that petitioner was set to go to trial. The statements and their effect on the public were in no way restricted by the rules and procedures which would normally be employed if the statements had been made during the course of trial. Therefore, the effect of these absolutely false statements concerning petitioner has a far more severe and intense prejudicial effect on the general public than it would if they had been made during trial.

Petitioner contends that the prosecutor's incorrect statements and their publication in newspapers and on radio and television give rise to a basis for dismissal of the indictment in this case. After all, in the instant case, a mistake of very significant proportion has been made by the prosecutor in bringing to the public's attention the alleged fact that petitioner had agreed to take a lie detector test.

As noted by the Michigan Supreme Court in *People* v *Reagan, supra*, when mistakes of such significant proportion are made, it is better that the consequences be suffered than that civilized standards be sacrificed. In the instant case, petitioner requests that this Court cause the consequences to be suffered by the State and dismiss the indictment against petitioner rather than permitting a trial to go forward where the jury at the outset would be prejudiced against petitioner and the civilized standards of due process would necessarily be sacrificed.

III. The statements made in the press regarding petitioner's alleged taking of a lie detector test no doubt created an irradicable presumption of partiality in the mind of the general public; therefore, it would be pointless and a waste of judicial time and expense of a trial in which jurors were supposedly going to lay their impressions or opinions aside and render a verdict based on the evidence presented in court; such a trial would work a deprivation of the petitioner's life or liberty without due process of law.

Petitioner realizes that, in these days of swift, widespread and diverse methods of communication, a case such as his can be expected to arouse the interest of the public.

As pointed out in Section I in this Argument, petitioner need not show *actual* partiality or unfairness on the part of the jury. The *probability* of unfairness or partiality on the part of the jury is sufficient. As pointed out by this Court in *Estes* v *Texas, supra*:

> "The State, however, says that the use of television in the instant case was 'without injustice to the person immediately concerned', basing its position on the fact that the petitioner has established no isolatable prejudice and that this must be shown in order to invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not prerequisite to reversal. This is such a case. It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." 381 U.S. 532, 542.

In the instant case, petitioner has already shown why the statements in the newspaper, radio and television, which were attributed to the prosecutor, have no doubt created the probability of unfairness and bias within the mind of the general public and offered the average man the possible temptation to forget the burden of proof required to convict the petitioner. Mindful of the source, timing and nature of the statements made to the press, and mindful of the probability of unfairness and bias which these statements created within the mind of the general public, it is not necessary that this Court find that there has been *actual* prejudice but rather only the *probability* of prejudice and unfairness to enable it to take whatever action it sees fit to remedy the

prejudice and unfairness created by the statements made to the press concerning petitioner's alleged taking of a lie detector test.

If petitioner is forced to go to trial, no amount of cautionary instructions given by a court will overcome the bias and prejudice already present in the minds of the potential jurors due to the statements regarding petitioner's alleged taking of a lie detector test. The fact that jurors will not forget what they have already heard or read about a case, even after being given cautionary instructions, is not a novel proposition and has been recognized in several case holdings. For example, in *Commonwealth* v *Johnson*, 441 Pa. 237, 272 A.2d 467 (1971), a witness testifying on behalf of the Commonwealth, testified that he and defendant had committed a burglary together. Previously, the witness had testified for the defense to the effect that he had committed the burglary alone. In rebuttal, the Commonwealth, in attempting to rehabilitate the witness, was permitted to refer to a lie detector test. Commenting upon this reference to a lie detector test, the Supreme Court of Pennsylvania held:

> "We agree that the witness's testimony was incurably bolstered by the reference to the lie detector test, we agree with the Superior Court dissenters that the charge of the trial court instructing the jury to limit its considerations strictly to the fact that the test had been administered could not remove the prejudice." *Id.* at 470.

The court then reversed the previous judgment and remanded the case for a new trial.

In *Delhaney* v *United States*, 199 F.2d 107 (1st Cir. 1952), defendant's case had attracted much adverse publicity. The district judge conscientiously did all he could, both in questions he addressed to the jurors at the time of their selection and in cautionary remarks in his charge to the jury, to minimize the effect of this damaging publicity, and to assure that defendant's guilt or innocence would be determined solely on the basis of the evidence produced at the trial. In vacating the judgment of conviction and sending the case back for a new trial, the First Circuit Court of Appeals said:

> "But as stated by Mr. Justice Jackson, concurring in *Krulewitch* v *United States*, 336 U.S. 440 (1949): 'The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction . . . .' One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity.
>
> . . .
>
> This is not a case of pre-trial publicity of damaging material, tending to indicate the guilt of a defendant, dug up by the initiative and private enterprise of newspapers. Here the United States, through its legislative department, . . . caused and stimulated this massive pre-trial publicity, on a nationwide scale. Some of this evidence was indicative of Delaney's guilt of the offenses charged in the indictment. Some of the damaging evidence would not be admissible at the forthcoming trial.
>
> . . .
>
> The prejudicial effect upon Delaney, in being brought to trial in the hostile atmosphere engendered by all this pre-trial publicity, would obviously be as great, whether such publicity were generated by the prosecuting officials or by a congressional committee hearing. In either case he would be put under a heavy handicap in establishing his innocence at the impending trial.

> . . . After the United States has imposed this burden upon the defendant, by making it difficult to determine his guilt or innocence solely on the basis of evidence to be presented at the impending trial, it seems to us neither right, nor in harmony with the spirit of the Sixth Amendment, for the United States to make him stand trial while the damaging effect of all that hostile publicity may reasonably be thought not to have been erased from the public mind." 199 F.2d at 112, 113, 114.

In *Irvin* v *Dowd, supra,* this Court noted that:

> "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." 366 U.S. 717, 727.

If petitioner is forced to go to trial, he will find himself in a worse position than the defendant in *State* v *Stiltner, supra.* In *Stiltner,* as mentioned above, the prosecutor had told newspapers that four out of five prospective defendants had taken lie detector tests and had been "cleared" by the test. In granting defendant's motion for change of venue, the Supreme Court of Washington noted:

> "It is apparent in this case that there existed a high probability of prejudice. The trial judge himself noted the difficulties inherent in any rule requiring an affirmative showing of actual prejudice:
>
> > 'Now this court recognizes the dilemma that (defendant's counsel) is put in in this matter and should comment, it seems to me, at this point. He is in a position where he must ask a juror whether or not he remembers a certain thing that he doesn't want him to remember and by doing so he may quicken or refresh that memory as to a newspaper article that may otherwise have been forgotten.'

> From our independent review of the record, we find that probability of prejudice is so apparent that it was error not to grant the motion for a change of venue." 491 P.2d 1048.

In the instant case, if petitioner goes to trial, counsel will naturally have to examine each juror as to whether or not he or she knows of any statements concerning petitioner's alleged agreement to take a lie detector test. Petitioner should not be placed in such an untenable position. This Court has the power to find that the probability of prejudice is so great that the remedy of dismissal should be granted.

Petitioner realizes that a motion to dismiss an indictment is only one of several ways in which courts have held that bias or prejudice in the mind of the general public can be remedied. The other alternative means to remedy the bias or prejudice are a change of venue and a continuance. A motion to change venue or a motion to continue this action would not effectively remedy the erroneous publicity concerning petitioner's lie detector test.

Petitioner has presented a motion for a change of venue to Judge Justin of the 13th District Court for the County of Jackson and the same has been granted. Trial is set for an indefinite date at an unknown location. Petitioner has been told he will be informed of the trial location only the day before trial. However, even with such motion being granted, petitioner will still be forced to go to trial before a jury which, like the jury which would be drawn in Jackson County, would also likely be prejudiced and biased by the statements concerning the lie detector test. Petitioner's former positions as Governor of the State of Michigan and a former State Supreme Court Justice caused most newspapers and radio and television stations in the State of Michigan to cover and have continuing interest in the story concerning petitioner's arrest. These newspapers, radio and television stations have also covered the story concerning petitioner's alleged "lie detector test." These stories will no doubt be

repeated in the press in the locale wherever and whenever petitioner's case has been (or will be) transferred.

The erroneous statements made to the press by the prosecutor concerning the lie detector test are so prejudicial that the only realistic action which this Court could take to effectively negate such error would be to grant this petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN H. SCHOMER
Attorney for Petitioner
One Jackson Square
Jackson, Michigan 49201
Telephone: (517) 787-2550

Dated:

Appendix A

APPENDIX A

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 6th day of April in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable

MARY S. COLEMAN,
Chief Justice,
THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 24-179
(24-179a)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v 61911, 61912
JOHN B. SWAINSON,
Defendant-Appellant.

COA: 78-2511, 78-2512
LC: 78-013680-AV,
78-013841-AV

On order of the Court, plaintiff-appellee's motion for immediate consideration is considered, and it is GRANTED.

Defendant-appellant's application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should now be reviewed by the Court.

1128

Appendix A

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 6th day of April in the year of our Lord one thousand nine hundred and seventy-nine.

[SEAL]

(s) CORBIN R. DAVIS
Deputy Clerk.

Appendix B

APPENDIX B

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 5th day of June in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable

MARY S. COLEMAN,
Chief Justice, CR 24-179b
THOMAS GILES KAVANAGH, CR 24-179c
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v 61911, 61912
JOHN B. SWAINSON,
Defendant-Appellant.

COA: 78-2511, 78-2512
LC: 78-013680-AV,
78-013841-AV

On order of the Court, plaintiff-appellee's motion for immediate consideration is considered, and it is GRANTED.

Defendant-Appellant's motion for rehearing is DENIED because GCR 1963, 864.4, provides for the filing of such motions only in opinion cases. Defendant-appellant's motion is treated as a motion for reconsideration of this Court's order of April 6, 1979, and the motion is DENIED, because it does not appear to the Court that said order was entered erroneously.

Appendix B

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 5th day of June in the year of our Lord one thousand nine hundred and seventy-nine.

[SEAL]

(s) CORBIN R. DAVIS
Deputy Clerk.

Appendix C

APPENDIX C

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 26th day of July in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable
MICHAEL J. KELLY
Presiding Judge
WALTER P. CYNAR
DONALD E. HOLBROOK, JR.
Judges

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff-Appellee,*	Docket Nos.	78-2511 78-2512
v	L.C. Nos.	78-013680-AV
JOHN B. SWAINSON, *Defendant-Appellant.*		78-013841-AV

In this cause an application for leave to appeal is filed by defendant-appellant, and an answer in opposition thereto having been filed, and a motion for immediate consideration and a motion to terminate the stay are filed by plaintiff-appellee, and answers in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for immediate consideration be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the application be, and the same is hereby DENIED for failure to persuade the Court of the need for immediate appellate review.

IT IS FURTHER ORDERED that the prosecutor's motion to terminate the stay of proceedings heretofore entered in the cause below be, and the same is hereby DENIED.

Judge Kelly concurring would further caution the Jackson County Prosecuting Attorney to adhere to the canon of professional responsibility regarding trial in a criminal matter, DR 7-107, especially those portions thereof prohibiting extrajudicial statements disseminated by means of public communication that exceed the limits contained therein.

STATE OF MICHIGAN — ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 28th day of July in the year of our Lord one thousand nine hundred and seventy-eight.

(s) RONALD L. DZIERBICKI
Clerk

APPENDIX D

ORDER

At a session of said Court, in the Courthouse, City of Jackson, County of Jackson, State of Michigan, on the 30th day of May, 1978.

PRESENT: Honorable Russell E. Noble,
Circuit Judge

Defendant having filed an Application for Leave to Appeal from Orders of the 12th and 13th District Courts in the above-entitled matters denying motions to quash the complaints and warrants to dismiss, and the Court having read the Application, Answer, Supporting Briefs, and having heard oral arguments.

IT IS HEREIN ORDERED that the Application for Leave to Appeal is Denied.

Immediate appeal from this Order to be taken by Defendant-Appellant, and Defendant-Appellant having furnished the requisite bond and filed same with the clerk of the Court, and this Court having approved said bond, it is FURTHER ORDERED that the proceedings herein be and the same hereby are stayed pending the appeal of this Order to the Court of Appeals or the Supreme Court and until the further Order of this Court or the Court of Appeals or the Supreme Court.

RUSSELL E. NOBLE
Circuit Judge

Dated: May 30, 1978

AMENDED OPINION BY THE COURT

Defendant has applied for leave to appeal from orders of the 12th and 13th District Courts in the above-entitled matters denying motions to quash the complaints and warrants and dismiss and, in the alternative, motions for change of venue. Since the filing of the application, the 13th District Court has granted the motion for change of venue.

Defendant is charged in the 12th District Court with the offense of driving under the influence of liquor and in the 13th District Court with possession of marijuana. Defendant claims that it would be impossible for him to obtain a fair trial by an impartial and objective jury in this county or elsewhere in the state on account of pretrial publicity. Defendant claims that the prosecutor advised various news media that the defendant would submit to a polygraph examination. There seems to be no doubt but that this possibility was widely disseminated in the public press and other news media, locally and state wide. Defendant has appended to his brief several newspaper articles mentioning defendant's failure to undergo a breathalizer test with respect to the alcohol content of his blood and the prospects of a polygraph examination concerning both cases.

Appellant claims that prospective jurors cannot properly be questioned concerning their knowledge or lack of knowledge of pretrial publicity, especially the possibility of defendant's undergoing or being offered a polygraph examination, without informing the jurors of the very things that must be concealed from them.

The 13th District Court in its case has granted defendant's motion for change of venue. While the defendant is well-known throughout the state as a former legislator, governor and Justice of the Michigan Supreme Court, and the change of venue may not serve to obtain jurors with no knowledge of the case, the court cannot agree that it would be impossible for astute counsel to frame questions to prospective jurors on voir dire which would elicit the information sought from them without revealing to them the forbidden information.

While the pretrial publicity has been unfortunate, the court cannot rule at this time that the defendant has thereby been deprived of any possibility of a fair trial in either case, whether tried in this county or in such county as the matter may be removed.

The Application for Leave to Appeal, in each case, is, therefore, denied.

(s) RUSSELL E. NOBLE,
Circuit Judge

Dated: May 10, 1978

OPINION BY THE COURT

Defendant has applied for leave to appeal from orders of the 12th and 13th District Courts in the above-entitled matters denying motions to quash the complaints and warrants and dismiss and, in the alternative, motions for change of venue. Since the filing of the application, the 13th District Court has granted the motion for change of venue.

Defendant is charged in the 12th District Court with the offense of driving under the influence of liquor and in the 13th District Court with possession of marijuana. Defendant claims that it would be impossible for him to obtain a fair trial by an impartial and objective jury in this county or elsewhere in the state on account of pretrial publicity. Defendant claims that the prosecutor advised various news media that the defendant would submit to a polygraph examination. There seems to be no doubt but that this possibility was widely disseminated in the public press and other news media, locally and state wide. Defendant has appended to his brief several newspaper articles mentioning

defendant's failure to undergo a breathalizer test with respect to the alcohol content of his blood and the prospects of a polygraph examination concerning both cases.

Appellant claims that prospective jurors cannot properly be questioned concerning their knowledge or lack of knowledge of pretrial publicity, especially the possibility of defendant's undergoing or being offered a polygraph examination, without informing the jurors of the very things that must be concealed from them.

The 13th District Court in its case has granted defendant's motion for change of venue. While the defendant is well-known throughout the state as a former legislator, governor and Justice of the Michigan Supreme Court, and the change of venue may not serve to obtain jurors with no knowledge of the case, the court cannot agree that it would be impossible for astute counsel to frame questions to prospective jurors on voir dire which would elicit the information sought from them without revealing to them the forbidden information.

While the pretrial publicity has been unfortunate, the court cannot rule at this time that the defendant has thereby been deprived of any possibility of a fair trial in either case, whether tried in this county or in such county as the matter may be removed.

The motion to dismiss, in each case, is, therefore, denied.

(s) RUSSELL E. NOBLE,
Circuit Judge

Dated: May 1, 1978

APPENDIX E

ORDER

At a session of said Court, in the Courthouse, City of Jackson, County of Jackson, State of Michigan, on the 7th day of March, 1978.

PRESENT: Honorable Robert E. Biewend,
District Judge

Defendant's Motion to Dismiss Indictment having come before this Court, together with brief and the prosecutor having answered, and the defense having filed reply, the Court fully being apprised finds as follows:

The facts before the Court are that Defendant was charged with Driving Under the Influence of Liquor and arraigned before this Court. After Defendant was arrested for said charge, he was searched and a marijuana cigarette was allegedly found in his pocket, which led to a charge of Possession of Marijuana in another jurisdiction, to wit: 13th District Court.

The four reasons submitted by the Defendant as grounds for dismissal all refer to the alleged fact that the prosecutor made certain statements to the press concerning Defendants taking a polygraph examination in reference to the marijuana charge, and the effect thereof, denying due process to the Defendant and violation of his right to obtain a fair trial before a jury.

First, the Court recognizes that, while the polygraph matter was involved only in regard to the other charge, the resulting sensationalism in the press would have some, if not equal, adverse effect on the matter before this Court.

The Court gives special attention to the cases cited by Defendant, *United States* v. *Milanovich* and *Allen* v. *United States* where the prosecutor revealed prejudicial information to the press. In those cases the Court said it was "a gross violation of professional propriety" and a serious mistake by

the prosecution, "one that cannot be too severely condemned", but it must be noted that the Courts did not find it grounds for dismissal of the alleged offense.

There is no question that reference to polygraph by the prosecution is not permitted in Michigan Courts, and mere mention of the word at trial may well result in a mistrial. Here the contention of Defendant is that pre-trial reference to polygraph makes it *probable* that potential jurors have been unduly influenced and prejudiced by the erroneous statement concerning the lie detector test, and that probability of unfairness deprives Defendant of his right to a fair trial.

Defense is faced with the dilemma of not mentioing polygraph in Voir Dire at the risk of a juror so prejudiced being allowed to serve, or to ask the juror regarding the matter. If the juror hadn't heard it before, it would then be implanted in his mind by the defense attorney himself.

However, this Court cannot conclude that it is probable that potential jurors have been in fact unduly influenced by the erroneous statements in the press.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's Motion to Dismiss Indictment be and hereby is denied.

(s) ROBERT E. BIEWEND
District Judge

DATED: March 7, 1978

APPENDIX F

OPINION OF THE COURT

Defendant has filed a motion to dismiss the complaint because of massive pretrial publicity, apparently alleging that there is no district in this State where a potential jury has not been tainted. This Court agrees that the news media has shown a great deal more interest in this particular file than it normally does to a possession of marijuana charge. Since this is its right under the United States Constitution, one can only hope that the media will learn to exercise more self control than it has done in this case. However, this Court cannot accept Defendants' claim that the prosecutor is acting in concert with the media.

The Court has carefully read the briefs submitted and found no case which used the remedy sought by Defendant in this case, outright dismissal. In every case, a new trial was ordered if the appellate court determined that the publicity surrounding the initial trial prejudiced the rights of the defendant. In the instant case, there has been no showing that the traditional remedies for dealing with massive publicity cannot work, only allegations that they cannot. Absent such a showing, this Court cannot begin to consider the request made by Defendant.

Generally, the trial courts of this State are grounded in pragmatic fairness. For this reason, this Court must reject the request of the Defendant at this stage of the proceedings, just as it would have to question any existence of a logical basis for the Supreme Court's comments on page 313 of *People* v *Reagan*, 395 Mich 306 (1975), regarding when a polygraph examination should be given. A lack of practical experience and understanding of the operation of the criminal justice system is displayed by the four justices signing the majority opinion when they say:

> Ordinarily, dispositional use of polygraph test results should not occur after judicial proceedings have been instituted.

In many cases, a suspect has no interest in submitting to such an examination prior to the institution of judicial proceedings (the issuance of a warrant). To not understand this is to suffer from a lack of balance between high theory and pragmatism.

In any event, this Court is not privy to the negotiations, if any, that have been going on between the parties and plans to conduct a fair and unbiased trial within the limits set by both sides. Since no motion for change of venue has been presented to the Court, the Court expresses no opinion on the merits of such a request. However, the motion to dismiss is denied.

IT IS SO ORDERED.

James M. Justin,
District Judge

Dated: March 10, 1978

APPENDIX G

JACKSON CITIZEN PATRIOT
November 16, 1977

Ex-Gov. Swainson faces 'pot,' drinking charges

By NOLAN FINLEY
Citizen Patriot Staff Writer

Former Gov. John B. Swainson was arrested in Jackson County early today, and charged with drunk driving and possession of marijuana.

Swainson was arrested shortly after 1 a.m. by state police troopers, who said he was driving erratically on M-50 in Napoleon Township. Swainson, who was alone, was lodged in the county jail for the remainder of the night.

The 51-year-old former governor and state Supreme Court justice stood mute in 13th District Court on charges of possessing a marijuana cigarette. Judge James M. Justin ordered him to appear for trial on the misdeamenor charge at 2:15 p.m. Nov. 21. He was released on $100 cash bond.

On the drunk driving charge, Swainson stood mute before 12th District Judge Robert E. Biewend, and was ordered to appear Dec. 1 at 1:30 p.m. A $100 personal bond was set.

He was arraigned in the two different courts because the drunk driving offense occurred outside the city, and the suspected marijuana was not found until he was brought downtown.

Swainson had little to say.

"I don't wish to comment, I think you can understand that," he said. "I am mortified, extremely embarrassed."

Swainson said he was returning to his Manchester home from a private party in Lansing when he was arrested. He said he did not realize he was too intoxicated to drive. He would not commenct on the marijuana charge.

Lt. Floyd Garrison, commander of the state police post at Jackson, said troopers observed Swainson driving very slowly and weaving back and forth across the center line.

He was stopped, determined to be intoxicated, and taken to the Jackson County jail, Garrison said. At the jail, troopers making a routine search of Swainson discovered a marijuana cigarette in his suit pocket, Garrison said.

"He was a perfect gentlemen," Garrison said. "He never tried to use his influence, he never mentioned being a former governor or judge."

Swainson had a long career in Michigan politics until he was convicted in U.S. District Court in 1975 of lying to a federal grand jury investigating an alleged conspiracy aimed at winning a new trial for John J. Whalen, a convicted burglar. He was acquitted on a bribery charge.

Swainson, who was forced to resign as a justice of the Supreme Court after his conviction, served a 60-day sentence in the Community Treatment Center, Detroit, for three counts of perjury.

At 29, he was the youngest (at the time) politician to be elected to the state Senate. Six years later, at age 35, he was elected governor of Michigan, the youngest in this century. Before his defeat by George Romney after one term in 1962, Swainson was thought to be the brightest star.

The arrest came as Swainson announced plans to appeal his suspension from private law practice. His attorney, Konrad D. Kohl of Bloomfield Hills, has asked the state Bar Grievance Board to modify the suspension imposed Oct. 7 by a three-member hearing panel.

THE ANN ARBOR NEWS
November 16, 1977

Ex-Gov. Swainson Arrested

JACKSON—Former Gov. John B. Swainson was arrested in Jackson County early this morning on charges of possession of marijuana and drunk driving.

Swainson was arrested shortly after 1 a.m. by state police officers who observed him driving "irratically" [sic] on M-50. He was lodged in the County Jail for the remainder of the night.

The 61-year old former governor and state Supreme Court Justice stood mute in Jackson County's 13th District Court on charges of possessing a marijuana cigaret. Judge James M. Justin, ordered him to appear for trial on the misdemeanor charge at 2:15 p.m. Nov. 21 and released him on $100 cash bond.

ON THE DRUNK driving charge Swainson again stood mute before 12th District Judge Robert E. Biewend and was ordered to appear Dec. 1 at 1:30 p.m. A $100 personal bond was set.

The arraignment in two separate courts was because the drunk driving arrest was made in Napoleon Township, and the marijuana arrest was made later in the city of Jackson.

Approached before his arraignment Swainson said he was extremely embarrassed by the arrests.

"I don't wish to comment. It think you can understand that," he said. "I am mortified, extremely embarrassed."

Swainson said he was returning alone to his Manchester home in Washtenaw County from a private party in Lansing when he was arrested. He said he did not realize he was too intoxicated to drive.

LT. FLOYD Garrison, commander of the Jackson State Police Post, said troopers observed Swainson driving very slowly and weaving back and forth across the center line.

He was stopped, determined to be intoxicated, and taken to the Jackson County Jail, Garrison said. At the jail troopers making routine search of Swainson discovered a marijuana cigarette in his suitpocket.

"He was a perfect gentleman," Garrison said. "He never tried to use his influence. He never mentioned being a former governor and judge."

APPENDIX H

THE ANN ARBOR NEWS
November 17, 1977

Swainson's Drinking:
'Melancholy Over Injury'

FROM UPI AND LOCAL ACCOUNTS

JACKSON—Former Gov. John B. Swainson says melancholy on the anniversary of the loss of his legs in a World War II land mine explosion may have led to his arrest on drunk driving charges.

But Swainson, who resigned from the Michigan Supreme Court because of a federal perjury conviction in 1975, said Wednesday he did not think he was too drunk to drive and "had no idea" how a marijuana cigarette got into his suit coat pocket.

The 52-year-old World War II hero was arrested early Wednesday on M-50 in the nearby village of Napoleon, about 10 miles west of his home in rural Manchester, and charged with drunk driving and marijuana possession.

Lt. Floyd Garrison of the Jackson State Police post said a trooper saw Swainson "driving at a very slow rate of speed very erratically, crossing the center line, dropping off the road and so forth. It was determined he was intoxicated, and he was arrested for driving under the influence."

Swainson was taken to the Jackson County Jail where a routine search turned up a marijuana cigarette in his suit coat pocket leading to a second charge of marijuana possession.

"I was surprised," Swainson said later, "I had no idea how it got there."

Swainson said he had been to a party for a state senator at a popular Lansing restaurant and bar Tuesday night and admitted he had been drinking there.

He said Tuesday was the 33rd anniversary of the World War II land mine explosion that cost him both of his legs just below the knee and added that the occasion always "has an effect on me."

"I would think that it would be quite possible that I did that (drank excessively)" because of melancholy over the injury, Swainson said.

Helso said the arresting officer may have thought he was stumbling when he was actually having difficulty getting out of his 1978 Oldsmobile because of his two artificial legs.

"The next thing I knew they had me in the back of the State Police car and they're hauling me away." Swainson said. "I remember the ride to the jail."

Speculating on the marijuana cigarette, Swainson, who once served as head of a state drug abuse program, said "Somebody may have put it in my pocket to get rid of it."

Swainson stood mute in district court to both misdemeanor charges, a plea of innocent was entered on his behalf and he was freed on $100 bond after spending the night in jail. Trial on the drug charge was set for next Monday and a hearing for the drunk driving charge scheduled Dec. 1.

He said the episode left him feeling "terrible. I'm really mortified."

Swainson said he would meet with his lawyer today to decide if he will fight the charge.

Swainson, who served as Michigan's last Democratic governor from 1960 to 1962, was a member of the state Supreme Court when he was convicted in November 1975 of perjury for lying to a federal grand jury investigating charges he accepted a $20,000 bribe to help a convicted burglar win a new trial. He was acquitted of the bribery charge.

He was forced to resign from the high court, lost his appeal and served 60 days in a Detroit halfway house. Swainson said he is currently on unsupervised federal probation and was not immediately sure how Wednesday's arrest might affect his status.

APPENDIX I

THE DETROIT NEWS
November 17, 1977

Swainson faces new problems
By EARL B. DOWDY
News Staff Writer

Honors beyond number have come to John Burley Swainson, onetime political boy wonder. Although left a legless teenager in World War II, he rose swiftly in public life, serving in among other positions as state senator, governor and State Surpeme Court justice in less than 20 years.

Now, at 51, Swainson sits at home on his sheep farm near Manchester, a Washtenaw County village, facing the latest of several crises which have shattered that bright career.

Monday he is scheduled to go to trial for possession of a marijuana cigaret. Ten days later he faces trial for drunk driving. He also may be called in by federal authorities for possible violation of terms of a suspended sentence for perjury.

(Swainson, who established and once headed a statewide program to fight drug problems, last night denied that he was driving while drunk and said he was "amazed" that State Police found a marijuana cigaret in his coat pocket.)

Meanwhile, a new petition for reinstatement of his law license seems unlikely to receive prompt action from the State Bar Grievance Board.

HIS LICENSE WAS suspended for three years Oct. 7 because of Swainson's 1975 conviction for lying to a federal grand jury investigating a bribery charge against him. He was acquitted of taking the bribe to arrange a new trial for burglar John J. Whalen. But he served 60 days in a Detroit halfway house as punishment for the perjury conviction, and remains on probation.

The latest arrest occurred early yesterday. State Police said they saw his car weaving erratically on M-50 near the Jackson County village of Napoleon, about 15 miles west of Swainson's farm.

He refused to take a "breathalyzer" test for sobriety, troopers said, and was taken to the county jail in Jackson, where the marijuana was found in his suit pocket.

(Swainson denied last night that he refused to take a "breathalyzer" test. He said police never asked him to take the test.)

Lt. Floyd Garrison, commander of the State Police Jackson Post, described Swainson as behaving like "a perfect gentleman" after his arrest.

"He never tried to use his influence," Garrison said. "He never mentioned being a former governor or judge."

UNSHAVEN, red-eyed and tieless, Swainson told a newsman he was "extremely embarrassed" and "mortified" as he went before District Judge James M. Justin for arraignment on the marijuana charge. Representing himself, he remained silent on that count.

Justin told him the usual bond was $100 cash and he could not make an exception for Swainson, who posted it with five $20 bills to guarantee his appearance Monday. He then went before District Judge Robert E. Biewind, who released him on $100 personal bond (no cash required) to await trial Dec. 1 on the drunk driving charge.

A spokesman for the U.S. Department of Justice said that agency would await an official report from the State Police and Jackson County courts before submitting a recommendation to the Federal Court in Detroit about possible revocation of Swainson's probation on the perjury conviction. The probation runs until next Feb. 28. He could be sent to a federal prison as a probation violator, even though the new charges involve state offenses.

Police said Swainson told them he was returning to Manchester from a party in Lansing and did not realize he had had too much to drink. He has no previous driving offenses on his record, the only restriction being that he use an automatic gearshift.

THIS IS REQUIRED because of the artificial legs he has worn since his own were blown off in 1944 by a land mine,

when he was an 18-year-old infantryman in France. Sent home, he entered Olivet College, where he met and married Alice Nielson. They have three children.

He earned a law degree at the University of North Carolina, becoming president of its Law School Association, and started practice in Detroit in 1951. Elected to the State Senate in 1954 and 1956, he was chosen Democratic floor leader during his second term. He became lieutenant governor in 1958.

Two years later, Swainson was elected at 35 as Michigan's youngest governor in the last century. Political observers viewed him as a future prospect for the U.S. Senate or even President. But his star faded rapidly in 1962 with the sudden popularity of automotive executive George Romney, who recaptured the governorship for the Republican Party after a 14-year wait.

Swainson resumed private law practice briefly before starting back up the legal ladder, first as a Wayne Circuit Court judge.

It was while he was on the Circuit bench, in 1969, that Swainson formed a statewide organization called NARCO (for Narcotics Addition Rehabilitation Coordinating Organization). One goal of the organization was to raise $250,000 to match $750,000 in federal funds to open a drug treatment clinic in Detroit.

HIS INVOLVEMENT in the program ended the next year when he was elected to the Supreme Court, where he served until his resignation under fire by the federal grand jury in 1975.

Conviction in that case also cost him the right to earn his living as a lawyer for three years, dating from the State Bar's suspension order last Oct. 7. At that time he said he would not appeal it because of "personal and professional relationships" with members of the Bar's Grievance Board.

But it was learned Tuesday—just hours before his arrest for drunk driving and possession of marijuana—that his attorney, Konrad D. Kohl, had petitioned Oct. 24 to have the suspension made retroactive to Nov. 7, 1975, when

Swainson voluntarily refrained from practicing law. This would permit him to regain the license next November, rather than in 1980.

"These new incidents (in Jackson County) appear unrelated to the matter for which Mr. Swainson's license originally was suspended," said a spokesman for the State Bar Grievance Board administrator's office. "But, of course, we will monitor their outcome in the local courts.

"IN THE MEANTIME, it should be remembered that every man has a right to be considered innocent until proved guilty."

In a telephone interview last night, Swainson denied he was driving while drunk. He admitted attending a party and having "a couple of drinks," but not enough for him to be considered drunk.

He said the arresting officers asked him to leave his car and get into their scout car.

"When I was getting out of the car I had difficulty," he said. "I have to stretch my legs because of my braces to get out of the car. But after I got out they never asked me to walk a straight line or touch my nose with my finger. I know I was very lucid.

"When I got to the station, they immediately stripped me down and found that marijuana cigaret.

"I have no idea—none—how it got into my coat pocket. I have never smoked marijuana in my life. I'm a consultant to SHAR House (a group devoted to helping drug addicts break their habits) and was with some SHAR people on Monday.

"THE QUESTION IS, did someone put contraband in my pocket then? I've tried to remember what suit I had on Monday, or where I was when I last wore that suit."

Swainson then talked morosely about his continuing trouble.

"I don't know what's going on," he said. "I feel my name is being blackened for a reason, but what reason I don't know.

"I'm in the public eye and am fair game, I guess. All of a sudden my world is tumbling down.

"I have no answers on what is happening to me. I know I didn't do these things. But even if the charges are not proven in court, the allegations alone will kill you.

"I regret this more because of my family, and I'm terribly disappointed."

APPENDIX J

DETROIT FREE PRESS
November 17, 1977

Drunk Driving, Pot Charges
Swainson Is Jailed Overnight
BY PETER C. GAVRILOVICH
Free Press Staff Writer

John B. Swainson, former Michigan governor and state Supreme Court justice, was arrested Wednesday and jailed overnight, charged with drunk driving and possession of marijuana.

Swainson, who resigned from the state's high court after he was convicted of perjury two years ago, admitted later in an interview that he had been drinking but said he didn't think he was too drunk to drive.

He said he did not know how a marijuana cigaret got into his suit coat pocket, but thought perhaps someone he does not know placed it there.

He said he felt "terrible. I'm really mortified."

State police at Jackson said Swainson was arrested for driving under the influence of liquor at 1:05 a.m. Wednesday in the hamlet of Napoleon, just east of Jackson and about 10 miles west of the Swainson home in Manchester, Mich.

Police said he was driving on M-50 "in a slow and erratic manner, crossing the center line and drifting onto the shoulder."

Police said Swainson was alone when arrested, driving a 1978 Oldsmobile. They said he was "very co-operative and a perfect gentleman." Police said Swainson was not given a breathalizer test to determine the level of his drinking, but was arrested at the scene.

When Swainson was brought to the Jackson County Jail, he was routinely searched. Police said a marijuana cigaret was found in the pocket of his suit coat.

SWAINSON, who spent the night in jail, was arraigned Wednesday morning on both misdemeanor charges. He

pleaded not guilty to the drunk driving charge and stood mute on the charge of possessing marijuana. He was freed on $100 bond.

Swainson said he is on unsupervised probation as a result of his 1975 perjury conviction. He said he was unsure what a conviction on either of Wednesday's charge would do to his probation status.

Swainson said he had been to a party Tuesday night in Lansing for state Sen. Arthur Cartwright, D-Detroit. He said he thought he had had three martinis at the party, held at Alex's, a popular Lansing nightspot.

After the party broke up at about 7:30 p.m., Swainson said, he joined a group of friends at the bar in Alex's, leaving for home at about 10 p.m.

He said it takes him about 90 minutes to drive from Lansing to Manchester.

"I WAS within 10 miles of home," Swainson recalled. "They pulled me over and said I had gone over the yellow line. When I got out of the car, I lurched."

Swainson, 53, said he has difficulty maneuvering out of car because he has artificial legs. Both his legs were amputated below the knee as a result of a battle wound in World War II.

Swainson's battle wound—he was injured when a land mine exploded—occurred 33 years ago Tuesday, he said.

Swainson said the anniversary of his combat wound "has an effect on me. I always count up the years. I would think that it would be quite possible that I did that (drank excessively)" because of melancholy over the injury.

Swainson said the artificial legs make him unsteady and that someone who doesn't know that he has artificial limbs might think he was stumbling.

"The next thing I knew they had me in the back of the State Police car and they're hauling my car away."

Swainson said he was lucid when arrested and transported to the jail. "I remember the ride to the jail," he said.

He said that at the jail he was told to take off his clothes.

When police searched his pockets, they found the marijuana. "I was surprised. I had no idea how it got there."

Swainson, who served as head of NARCO, a state drug abuse program, said he has been doing consulting work for Shar House, a drug rehabilitation facility.

He said he visits Shar House locations at least twice a week and had most recently visited one on Monday.

Swainson, speculating on the marijuana cigaret, suggested, "Somebody might have put it in my pocket to get rid of it."

ASSOCIATES of Swainson said Wednesday that they were surprised by his arrest.

"No way is that normal behavior," said one. "I can't condone it. But any person who has gone through what John Swainson has gone through, I can understand it."

Swainson said he has been depressed lately. His license to practice law was suspended for three years last month because of his perjury conviction.

Swainson was convicted in 1975 on three counts of lying to a federal grand jury while answering questions related to a bribery investigation.

Swainson was charged with accepting a $20,000 payment from a man who wanted to get a new trial before the state Supreme Court while Swainson was a justice. He was acquitted of bribery.

"It's been tough," he said. "When you lose a high government position like I did, it's been depressing."

Swainson last month appealed the State Bar Grievance Board hearing panel's suspension of his right to practice law. Swainson's appeal will be considered early next year.

Swainson is to appear in 13th District Court in Jackson Monday on the Marijuana possession charge. He has a Dec. 1 pre-trial date on the drunk driving charge in 12th District.

APPENDIX K

JACKSON CITIZEN PATRIOT
November 18, 1977

Swainson seeks delay in 'pot' trial

Attorneys for former Gov. John B. Swainson have asked for an adjournment of his Monday trial in 13th District Court on possession of marijuana charges.

Swainson, who sat on the state Supreme Court until he was forced to resign in 1975, was arrested early Wednesday morning in Napoleon Township by State Police troopers who said he was "driving erratically."

State police troopers said Swainson refused to take a breath test to determine if he was intoxicated. Swainson says he was not offered one. Refusal to take the test is an automatic six-month suspension of driving privileges under Michigan law.

Swainson was taken to Jackson County jail, where troopers said they found a marijuana cigarette in his suit pocket.

Detroit attorney James Falahee said the adjournment request was made to allow lawyers time to prepare a defense. Judge James M. Justin has taken the matter under consideration.

In interviews following his arrest, Swainson said he did not know how the marijuana got in his pocket. He speculated that it may have been slipped into his suit on Monday when he visited Shar House, a Detroit drug rehabilitation center where he does consulting.

He also told reporters that he was on his way home from a party given for Sen. Arthur Cartwright, D-Detroit, when he was arrested. He admitted that he had three martinis and perhaps more after the party, when he joined friends at Alex's, a Lansing nightspot.

Swainson also said he had been depressed that evening. He said he was remembering the anniversary of a combat accident in World War II that took both his legs. Thirty-three years ago last Tuesday. Swainson stepped on a land mine,

and he said the anniversary may have contributed to his excessive drinking that night.

Swainson, who is presently appealing his suspension from the private law practice, was convicted in 1975 on three counts of lying to a grand jury while answering questions related to a bribery investigation.

He is scheduled to appear in 12th District Court Dec. 1 on the drunk driving charges.

THE ANN ARBOR NEWS
November 29, 1977

Swainson Jury Trial Plea Granted

JACKSON, Mich. (AP)—A request for a jury trial for former Gov. John B. Swainson on possession of marijuana charges is being granted by District Court Judge James Justin.

Swainson's attorneys had asked for a jury trial and for a postponement of proceedings to allow them time to prepare their case. The trial originally was scheduled to begin Monday.

No trial date was set when the judge granted the request on Friday.

Swainson, a former state Supreme Court justice who was suspended from the practice of law for a perjury conviction, was arrested early Wednesday and charged with possession of marijuana and drunken driving.

JACKSON CITIZEN PATRIOT
December 1, 1977

Swainson's trial date March 10

Former Gov. John B. Swainson waived the pre-trial conference on drunk driving charges set for today in 12th District Court.

Judge Robert Biewend ordered the 53-year-old Swainson to stand trial on the misdemeanor at 8:30 a.m. Friday, March 10.

Swainson was arrested in Napoleon Township Nov. 16 by state police troopers who said he was driving erratically on M-50. They charged him with drunk driving and lodged him in the Jackson County Jail.

Police searching Swainson's clothing at the jail said they found a marijuana cigarette in his suit pocket. He faces a 13th District Court trial in January on the possession of marijuana charge.

State police said Swainson refused to take a breathalyser test when he was arrested. Refusal to take the test results in an automatic 90-day driver's license suspension. Swainson told reporters after his arraignment that the troopers never asked him to take the test.

Swainson's attorneys have requested an appeal hearing on the license suspension. Swainson will be allowed to keep his license pending the outcome of that hearing.

Swainson was convicted in U.S. District Court in 1975 of lying to a federal grand jury investigating an alleged conspiracy aimed at winning a new trial for a convicted burglar. He served a 60-day sentence in the Community Treatment Center in Detroit for three counts of perjury.

The conviction forced his resignation from the state Supreme Court. He served as governor of Michigan from 1960 to 1962.

THE ANN ARBOR NEWS
December 1, 1977

Swainson Waives Pre-Trial Hearing

JACKSON, Mich. (AP)—Former Michigan Gov. John B. Swainson waived a pretrial conference on drunken driving charges scheduled for today in Jackson County District court.

Judge Robert Biewend ordered Swainson to appear for trial March 10.

Swainson, who resigned from the state Supreme Court in 1975 after being indicted by a federal grand jury, was convicted later that year of perjury. He served a 60-day sentence in working at a Detroit halfway house.

Swainson, who served as governor from 1960 to 1962, was arrested near Jackson Nov. 16. State troopers said he was driving erratically on Michigan 50. He was taken to the Jackson County jail where troopers said they found a marijuana cigarette in his suit pocket.

Swainson will go to trial in January on marijuana possession charges.

Swainson refused to take a breathalyzer test when he was arrested troopers said. Such a refusal results in an automatic 90-day suspension of a driver's license.

Swainson said following his arraignment that he was never asked to take the test. His attorneys have requested an appeal of the license suspension.

APPENDIX L

DETROIT FREE PRESS
December 18, 1977

Hero, Governor, Felon—
Fate Baffles John Swainson

BY REMER TYSON
Free Press Politics Writer

On Oct. 16, 1960, a newspaper caption under a photograph listed his life in brief:

"John B. Swainson was born 35 years ago in Windsor, grew up in Port Huron. A land mine explosion in World War II cost him both legs—a loss that he rarely mentions and that is hardly noticeable. He became a lawyer, practiced in Detroit and was elected to the Senate for two terms. In 1958 he was elected lieutenant governor. Today he is the Democratic nominee for governor. The candidate, his wife and three children live in Plymouth. He is a young man with high hopes."

And his hopes were fulfilled.

In 1960 he won the election and became Michigan's second youngest governor. After that he became what nearly every lawyer wants to be—a judge. First he was elected to the Wayne County Circuit Court, then in 1970 to the Michigan Supreme Court.

He and his wife, Alice, bought a 165-acre farm near Manchester, 15 miles west of Ann Arbor, and they built a fine though not elaborate house.

The Judge had an office in the State Judicial Building in Lansing and another in the Law Library building at the University of Michigan, where he mingled with future lawyers who aspired to be politicians and judges like him.

Swainson was often talked about as a possible Democratic candidate for the U.S. Senate as early as 1966, even though trouble with the feds was already brewing. His popularity remained such that in 1975 he was still the favorite of many party leaders to be the Senate candidate in the 1976 campaign.

But the decline and fall of John B. Swainson—war hero, lawyer, boy governor and judge—had begun. And it continues.

Beginning in July of 1975, his life in brief reads:

Indicted by federal grand jury on charges of bribery and perjury; convicted by a jury of three counts of lying to a grand jury; resigned from Michigan Supreme Court; perjury conviction affirmed by U.S. appeals courts; sentence served; disbarred as a lawyer for three years; works as consultant to Michigan AFL-CIO and a drug rehabilitation program in Detroit; lives on farm near Manchester; arrested last Nov. 16 in Jackson County on charges of drunk driving and possession of a marijuana cigaret, trials pending. He is a 52-year-old man who says he's trying to figure out what happened to him.

IN AN INTERVIEW last week, he said, "I've come in a period of three years from a person who though he was doing a job to—what happened? Why me?"

He went back to 1944 for an analogy. He was recovering in an English hospital from the land mine explosion that caused the amputation of both legs below the knees. He had been a star at the Port Huron High School, a fullback who ran well and the captain of the football team.

He was asking himself, "Why me—an athlete—and not this slob over here who isn't," when a visiting minister explained that he was a "symbol of suffering. Somebody sinned, and you're paying for it."

It's obvious that Swainson is either a crook with the tough steel of a ball bearing, as the FBI maintains, or he is a hapless victim of a cruel fate, as he maintains.

His felony conviction, like the loss of his legs, is with him every waking minute of every day, and his moods switch between the melancholy and the merry.

On one hand he says, "It's a ridiculous situation I find myself in. I'm a unique one. I'll probably go down in the history of Michigan as an asterisk. An asterisk that says: John Swainson, governor, convicted and died."

On the other hand, he says, "My life came together in the Army. I became a hero, got my education and went on to 20 years. I've enjoyed life and still enjoy it."

Then he tells of the reaction by a neighbor, Don MacIntosh, to the Page One headline about his recent arrest in Jackson County: Why don't you run for the Senate? I won't get my name in the paper until I die."

Swainson says, "It's so bizarre. Everything that happened. I'm amazed. I live with it day by day. . ."

BESIDES LIVING with his artificial legs and his conviction, Swainson is preoccupied with John Joseph Whalen, a professional criminal who was the key witness in Swainson's bribery-perjury trial.

Swainson's biggest hope is that something bizarre will happen to reveal Whalen's testimony as false, showing that there was never a bribery plot and that the federal prosecutors only took Swainson before a grand jury with intent of trapping him into a perjury charge.

Last April, Swainson thought that big break might be coming his way.

Whalen, 31, a burglar by trade, has managed to remain free to work at his career as a criminal by informing on others to law officers.

In October 1970 Whalen was convicted of burglary of the Berman jewelry store in Adrian and was sentenced to seven to 10 years.

In the Swainson trial, Whalen testified that to get a new trial he bribed Swainson through a bail bondsman.

In November 1975, a federal jury acquitted Swainson of bribery but convicted him of lying to the grand jury that had investigated the case.

Whalen did get a new trial from the Michigan Supreme Court in 1973. He was convicted a second time of the Adrian burglary in May 1974 and given eight to 10 years.

That sentence was still being appealed by Whalen when Swainson was convicted of perjury. After Whalen's appeal was turned down by Michigan appeals courts, federal authorities persuaded Michigan authorities to let them hold

Whalen in prison outside of the state. They said his life would be endangered in Jackson Prison because of his notoriety as an informer.

Whalen was taken to a federal prison in San Diego, was given the new name of Ronald Johnson, and was held virtually in solitary. He complained that the FBI has not kept a promise that he would not serve time for the Adrian burglary, that he would be given a new identity, that his family would be looked after, and that he would be set up in business.

Last March 29, according to one of Swainson's close friends, Oakland County lawyer David Sparrow, Whalen telephoned Swainson's chief defense lawyer and asked him to come to the San Diego prison to talk with him, implying that Whalen had something to say that would help Swainson.

Sparrow said that defense lawyer Konrad Kohl notifed the Swainson trial judge, U.S. District Judge Carl B. Rubin, about Whalen's phone call and informed the judge that Kohl and Sparrow planned to make the trip on Swainson's behalf.

Sparrow said he and Kohl talked with Whalen for more than an hour in the San Diego prison.

According to Sparrow, Whalen told them that the government had reneged on promises to keep him out of prison for the Adrian burglary and to help him financially.

Sparrow said Whalen told them that if they would help him win release, he would disclose information helpful to Swainson.

ACCORDING TO SPARROW, this is what Whalen told the lawyers:

Whalen said he could prove there was a reason why the Swainson bribery was conducted in 1973 but the indictment did not come until a year and a half later. Swainson contends that this 18 months was vital to him because his best witness died during that period.

Witnesses against Swainson lied to the grand jury, Whalen said.

Whalen said that he knew of people who wanted to get Swainson, knew he might run for the Senate in 1976 and wanted to stop him.

Whalen said he was asked by the federal prosecutor to use Swainson's name in taped conversations with the bail bondsman who was supposed to be the middle man in the bribery scheme. Whalen also said he tape recorded his conversations with the FBI and would release them.

The feds, Whalen claimed, knew he was burglarizing places and got him to do break-ins for them.

Sparrow said he and Kohl told Whalen that they represented only Swainson and could not help him. Nothing came of the conversation with Whalen, Sparrow said.

Since that time, Whalen has been released on bond from the San Diego prison pending a closed hearing in federal court there on a petition for a habeas corpus. He is asking to be freed from the Adrian conviction because he can't get fair treatment from members of Michigan's appellate courts since he testified against one of their fellow justices.

"I can't reconcile John Whalen being out on the street supported by the federal government and there won't be a public hearing," Swainson said in the interview last week. "I think of all the money they spent on my investigation. For what? The only person who's going to get anything is John Whalen."

Swainson continued, "It is my ultimate hope that people who stood with me be made privy of this kind of stuff and say, 'What's going on?' "

SWAINSON HAD HAD the feds' attention at least since 1962. A hidden FBI bug is said to have recorded the mention of Swainson's name in a conversation then among a group of men that the FBI had identified as top underworld leaders in Michigan.

The mob leaders talked about how they had paid off Swainson for doing them political favors while he was in office, according to the transcripts of the FBI tape recordings. The transcripts were sealed in a court case and never made public generally, but some reporters have what is purported to be copies of them.

Swainson said he learned of the suppressed transcripts after he was indicted in the bribery case in July 1975. He said

he did not know the men who supposedly engaged in the conversation about him and had never had any sort of dealings with them.

"People who know Alice and our family don't believe any of it" Swainson said. "That's been the most reassuring thing of the whole episode—people have been saying, "This isn't the John Swainson I know.' "

Some of Swainson's friends and political allies talk of a long-time federal conspiracy to do him in—citing the reports about the 1962 bugged conversation, an income matter that was brought up by the IRS when Swainson was a possible candidate for the Senate in 1966, and the 1975 indictment when he was again being talked about as a Senate candidate.

Surprisingly, for it is usually the first weapon a politician reaches for in such situations, Swainson has refrained from complaining in public that his political enemies are trying to get him.

"It would be terrible for me to think the federal government was doing this and keep on doing it," he said last week. "Why? I guess I grew up in an era when the federal government was forthright with its citizens . . . I had no idea any of this connected up . . . Of late, my faith has been shaken on many points."

In his public circles, Swainson is still treated as if he were the boy governor and war hero. Unions have held fund-raising affairs to help with his legal fees. He was invited to an exclusive party at Henry Ford II's place during the National Governors Conference in Detroit last summer.

As he walked through Carl's Chop House for lunch last week, he was stopped at a number of tables by people who wanted to shake his hand, and some old acquaintances asked, "You doing all right?" or "You need anything?" It was as if he were still governor.

Swainson said in the interview that, financially, "we're not hurting." He explained that he gets his disability pension from the government, he is paid as a consultant to Shar House and the AFL-CIO, his sons are grown and living away from home, his daughter's expenses at Michigan State

University are covered by the federal government because he is a permanently disabled veteran.

Yet, Swainson doesn't write off what has happened to him as part of the Irish politician's belief that God evens up things in life.

"I've often said it's a long road that takes no turns," he said. "I think sometime some of this will make sense rather than saying some days you fiddle and some days you dance."

APPENDIX M

STATE JOURNAL
November 22, 1977

Your Opinion

Story 'mortified' him

In response to your front page article that appeared in The State Journal Nov. 17, to say the least, I was mortified to think that a publication such as yours would devote a full quarter page of its front page to do nothing, in my estimation, but kick a man when he is down and as far as I can determine, for no other reason.

I refer to the article regarding our former Supreme Court Justice and Governor, John B. Swainson.

As I am sure most people in this area know, I am not of the same political leanings that John B. Swainson is, in fact I helped direct two political campaigns to defeat him as governor and was successful in one. In spite of this I still have admiration for this gentleman as an outstanding citizen of our country.

I want to make it perfectly clear, I do not feel that anyone is above the law and I am certain that Gov. Swainson feels the same way, but what I would like to know is why does a story like this demand such prime news coverage?

There are thousands of citizens that violate the same provisions of our laws everyday and we never hear about them . . . why?

First of all I think it is something when the American public must read a story that is written by a corporation, The Associated Press. Hasn't the news media enough courage to put their name or names to a story? Are these reporters thinking about the time when maybe they committed the same alleged crimes but were never caught? Or are they thinking about the times when maybe these same problems faced their families friends or neighbors?

Doesn't the working press feel they have done enough to drag this gentleman and his family down the drain? This

country is certainly in deep trouble when the news media can literally destroy a man because he is a human being and maybe made a mistake just like 99 percent of the people in this country have done at one time for [sic] another.

It's too bad that our news media can't use such prime front page space telling about the good that people do for one another. I cannot recall a front page, full quarter size, story about when John Swainson lost his two legs while defending our country and you and me, but I guess that doesn't sell newspapers.

I may be old fashioned but I still believe in many of the things that made our country great and one is that a man is innocent until proven guilty but I guess that isn't true today, so I guess I am no doubt off base.

I sincerely hope that everyone will remember that there is only one man in this universe that is perfect and that man is not John B. Swainson, you Mr. Editor or you Mr. Associated Press, whoever you are, or me, the writer of this letter, or you, the human being that is reading this letter.

PHIL O. PITTINGER
(Former State Senator
Lansing)

APPENDIX N

JACKSON CITIZEN PATRIOT
January 11, 1978

Swainson will take lie test

Jury selection for the marijuana possession trial of John B. Swainson has been adjourned to allow the former governor to take a lie detector test.

The jury was to be selected today in 13th District Court, but Judge Robert Crary agreed to postpone the case until Swainson can take the test.

Prosecutor Edward J. Grant said if Swainson passes the test the marijuana charges will be dropped. If the polygraph does not clear Swainson, his trial will be heard during the court's April session.

The former state Supreme Court justice was arrested in Napolean Township Nov. 16 by state police troopers who said he was driving erratically on M-50. They charged him with drunk driving and lodged him in the Jackson County jail.

Police searching Swainson's clothing at the jail found a marijuana cigarette in his suit pocket.

After his arrest, Swainson told reporters he was "extremely embarrassed" by the incident and said he thought the marijuana was slipped into his pocket during a visit to Shar House, a drug rehabilitation center in Detroit where he does consulting work.

Grant said no date has been set for the lie detector test.

Swainson is scheduled to appear in 12th District Court March 10 for trial on the drunk driving charge.

Swainson served as governor of Michigan from 1961 to 1962. He resigned from the state Supreme Court in 1975 after being convicted of lying to a federal grand jury investigating an alleged conspiracy aimed at winning a new trial for a convicted burglar.

A veteran of World War II, Swainson lost both his legs in a combat accident. The night he was arrested was the 33rd anniversary of that accident.

Swainson told reporters after his arrest that the memory of the event may have caused him to drink excessively at a party given in Lansing for Sen. Arthur Cartwright, D-Detroit, the night he was picked up.

He also claimed the state troopers who arrested him did not ask him to take a breath test to determine if he was intoxicated. State police charge that Swainson refused to take the test, which could result in the loss of his driving priviledges for six months.

APPENDIX O

DETROIT FREE PRESS
January 12, 1978

Swainson to Take Lie-Detector Test

JACKSON—(AP)—Jury selection for the marijuana possession trial of John B. Swainson has been adjourned to allow the former governor to take a lie-detector test.

The jury was to have been selected Wednesday in District Court, but Judge Robert Crary agreed to postpone the case until after the test.

Prosecutor Edward J. Grant said that if Swainson passes the test, the marijuana charges will be dropped. If the polygraph fails to clear Swainson, his trial will be heard by a jury during the court's April session.

The former state Supreme Court justice and ex-governor was arrested Nov. 16 in Napoleon Township, south of Jackson, by state troopers who said he was driving erratically on M-50. They charged him with drunken driving and lodged him in the Jackson County Jail.

Police, searching Swainson's clothing at the jail, said they found a marijuana cigaret in his coat pocket.

After his arrest, Swainson told reporters that he was "extremely embarrassed" by the incident and said he thought the marijuana may have been slipped into his pocket during a visit to Shar House, a drug rehabilitation center in Detroit where he is a consultant.

Swainson is scheduled to appear in another district court here March 10 for trial on the drunken driving charge.

THE ANN ARBOR NEWS
January 12, 1978

Swainson To Take
Lie Test In Pot Case

JACKSON, Mich. (AP)—Jury selection for the marijuana possession trial of John B. Swainson has been adjourned to allow the former governor to take a lie detector test.

The jury was to have been selected Wednesday in District Court but Judge Robert Crary agreed to postpone the case until after the test. No date for the test has been set yet.

Prosecutor Edward J. Grant said that if Swainson passes the test, the marijuana charges will be dropped. If the polygraph fails to clear Swainson, his trial will be heard by a jury during the court's April session.

The former state Supreme Court justice was arrested in Napoleon Township, south of Jackson, Nov. 16 by state police troopers who said he was driving erratically on Michigan 50. They charged him with drunken driving and lodged him in the Jackson County Jail. He lives near Manchester.

Police, searching Swainson's clothing at the jail, said the found a marijuana cigarette in his suit coat pocket.

After his arrest, Swainson told reporters he was "extremely embarrassed" by the incident and said he thought the marijuana was slipped into his pocket during a visit to Shar House, a drug rehabilitation center in Detroit where he is a consultant.

Swainson is scheduled to appear in another District Court here March 10 for trial on the drunken driving charge.

Swainson served as governor of Michigan from 1961 to 1962. He resigned from the state Supreme Court in 1975 after being convicted of lying to a federal grand jury investigating an alleged conspiracy aimed at winning a new trial for a convicted burglar.

A veteran of World War II, Swainson lost both his legs in a combat accident. The night he was arrested was the 33rd anniversary of that accident.

Swainson told reporters after his arrest that the memory of the event may have caused him to drink excessively at a Lansing party for Sen. Arthur Cartwright, D-Detroit, the night he was picked up.

He also claimed the state troopers who arrested him never asked him to take a breath test to determine if he was intoxicated. State Police charge that Swainson refused to take the breath test, an offense which could result in the loss of his driving privileges for six months.

DETROIT FREE PRESS
January 11, 1978

Swainson drug trial
adjourned until April

Special to The News

JACKSON—A district judge has adjourned until April the drug possession trial of former Michigan Supreme Court Justice John B. Swainson and said today he would dismiss the charges if the former Democratic governor proves in a lie test he had no knowledge of how a marijuana cigaret got in his pocket.

Judge Edward J. Grant, of the 13th District, granted a motion before jury selection today that permits defense attorney John Schomer to have Swainson take a polygraph test to prove his contention that someone at a drug rehabilitation center in Detroit must have dropped the marijuana cigaret in his jacket pocket unnoticed by Swainson.

Grant agreed to dismiss the charges if Swainson passes the test.

Swainson, who resigned the Supreme Court post after conviction of perjury in a bribery case in Detroit in 1975, was arrested by State Police on drunk driving charges in Napoleon Township, south of Jackson, on Nov. 16, the 33rd anniversary of a World War II combat accident in which Swainson lost both legs in France when he stepped on a land mine.

Swainson, onetime boy wonder of Michigan Democratic politics, said he had been attending a party in Lansing for Democratic State Senator Arthur Cartwright, of Detroit, and was headed south on M-50 on his way home to Manchester, southwest of Ann Arbor.

State Police said Swainson was driving erratically. Swainson admitted he may have had a lot to drink because of the war memory.

The drunk driving charge will be tried in March in Napoleon Township. Swainson has contended that State Police did not ask him to take a breath test for alcohol. State Police have said Swainson refused to take the test—a procedure provided by state drunk driving laws.

State Police said the marijuana cigaret was found in Swainson's pocket when he was searched at the Jackson County Jail in Jackson, before Swainson was held overnight there.

Swainson said he was working as a consultant at Shar House, a Detroit rehabilitation center, as part of his probation on the federal perjury charge. He was found guilty of lying to a federal grand jury but acquitted of bribery charges involving a new trial for a convicted burglar.

Swainson was a Detroit-area state senator and lieutenant governor under former Michigan Gov. G. Mennen Williams before he succeeded Williams as governor in 1961. The last Michigan Democratic governor, Swainson was defeated by Republican George Romney in 1963.

APPENDIX P

AFFIDAVIT OF JOHN H. SCHOMER

STATE OF MICHIGAN)
) ss.
COUNTY OF JACKSON)

John H. Schomer, being duly sworn, deposes and says as follows:

1. I am one of the attorneys for John G. Swainson in the above-entitled matter.

2. On December 15, 1977, I met with Jackson County Prosecutor Edward J. Grant to discuss the facts of the above-entitled matter and the adjournment of Defendant's trial for possession of marijuana. The only other person in attendance at this meeting was Mr. James B. Falahee, Jr., the other attorney for Defendant in the above-referenced matter.

3. Mr. Falahee and I had requested the meeting with Mr. Grant in order to discuss with Mr. Grant the possibility of adjourning Defendant's trial for the possession of marijuana until after Defendant's trial for driving under the influence of liquor.

4. Our purpose in requesting the adjournment of the trial for possession of marijuana was to give the 13th Judicial District Court the opportunity to examine the facts leading up to the search during which the marijuana was found on Defendant's possession in order to determine whether these facts established a lawful arrest.

5. At no time during the meeting with Mr. Grant did either I or Mr. Falahee mention to Mr. Grant the possibility of Defendant taking a lie detector test. On the contrary, the subject of Defendant's taking a lie detector test was first brought up by Mr. Grant.

6. Mr. Grant asked Mr. Falahee and me if Defendant would be willing to take a lie detector test as to the possession of marijuana charge. Both Mr. Falahee and I were unable to say whether Defendant would agree to take such a lie detector test.

7. Mr. Falahee and I told Mr. Grant that we would check with Defendant and get back to Mr. Grant if Defendant wished to take the lie detector test.

8. Mr. Grant said that we should get back to him as soon as possible if Defendant agreed to take the test as it would take some time to arrange for the test.

9. At no time did I inform Mr. Grant that Defendant had agreed to take the proffered lie detector test. In fact, I told Mr. Grant that Defendant had refused to take the lie detector test.

Further Deponent sayeth not.

(s) JOHN H. SCHOMER

Subscribed and sworn to before me
this 24th day of February, 1978.

(s) CHERYL L. WILLIAMS
Notary Public, Jackson County, Michigan
My Commission Expires: March 9, 1982

APPENDIX Q
AFFIDAVIT OF JAMES B. FALAHEE, JR.

STATE OF MICHIGAN)
) ss.
COUNTY OF JACKSON)

James B. Falahee, Jr., being duly sworn, deposes and says as follows:

1. I am one of the attorneys for John G. Swainson in the above-entitled matter.

2. On December 15, 1977, I met with Jackson County Prosecutor, Edward J. Grant, to discuss the facts of the above-entitled matter and the adjournment of Defendant's trial for possession of marijuana. The only other person in attendance at this meeting was Mr. John H. Schomer, the other attorney for Defendant in the above-referenced matter.

3. Mr. Schomer and I had requested the meeting with Mr. Grant in order to discuss with Mr. Grant the possibility of adjourning Defendant's trial for the possession of marijuana until after Defendant's trial for driving under the influence of liquor.

4. Our purpose in requesting the adjournment of the trial for possession of marijuana was to give the 13th Judicial District Court the opportunity to examine the facts leading up to the search during which the marijuana was found on Defendant's possession in order to determine whether these facts established a lawful arrest.

5. At no time during the meeting with Mr. Grant did either I or Mr. Schomer mention to Mr. Grant the possibility of Defendant taking a lie detector test. On the contrary, the subject of Defendant's taking a lie detector test was first brought up by Mr. Grant.

6. Mr. Grant asked Mr. Schomer and me if Defendant would be willing to take a lie detector test as to the possession of marijuana charge. Both Mr. Schomer and I were unable to say whether Defendant would agree to take such a lie detector test.

7. Mr. Schomer and I told Mr. Grant that we would check with Defendant and get back to Mr. Grant if Defendant wished to take the lie detector test.

8. Mr. Grant said that we should get back to him as soon as possible if Defendant agreed to take the test as it would take some time to arrange for the test.

9. At no time did I inform Mr. Grant that Defendant had agreed to take the proffered lie detector test. In fact, I told Mr. Grant that Defendant had refused to take the lie detector test.

Further, Deponent sayeth not.

(s) JAMES B. FALAHEE, JR.

Subscribed and sworn to before me this 24th day of February, 1978.

(s) CHERYL L. WILLIAMS
Notary Public, Jackson County, Michigan
My Commission Expires: Mar. 9, 1982

APPENDIX R

JACKSON CITIZEN PATRIOT
January 19, 1978

Swainson is overdue on lie test

John B. Swainson has not yet taken the lie detector test his lawyers requested in asking for a postponement of his trial on possession of marijuana charges.

Swainson was scheduled to appear in 13th District Court for trial this month. However, jury selection was adjourned last week to allow the former governor to take a polygraph test.

Edward J. Grant, county prosecutor, said Swainson has not arranged to take the test. His case has been rescheduled for trial April 15.

"If I don't hear from him by then, there will be no more adjournments," Grant said. "If the polygraph is not taken, we'll forget about it and go to trial."

Swainson was arrested Nov. 16 in Napoleon Township by state police troopers who said he was driving erratically on M-60. He was charged with drunk driving and lodged in the Jackson County jail.

A routine search of Swainson's clothing was made at the lock-up and a marijuana cigarette was found in his suit pocket.

Swainson said the cigarette may have been slipped into his pocket during a visit to a Detroit drug rehabilitation center, where he does consulting work.

If a polygraph supports Swainson's story, Grant has agreed not to prosecute on the marijuana possession charge.

Swainson faces trial on the drunk driving charge March 10 in 12th District Court.

APPENDIX S

MOTION

March 8, 1978

Jackson County Courthouse
Jackson, Michigan

BEFORE HON. ROBERT E. BIEWEND,
District Judge

Appearances: EDWARD J. GRANT, ESQ.
Prosecuting Attorney

JOHN H. SCHOMER, ESQ.
Attorney for the Defendant

Reported by: Linda J. Iuni R 0530
Official Court Recorder

Jackson, Michigan
Wednesday, March 8, 1978
(The Court and counsel present)

THE COURT: Call the matter of the People versus John Goad Swainson. You have a motion I understand. Counsel is in the Court Room, John Schomer. The record will also reflect that Mr. Ed Grant is here representing the People. You may proceed with your motion, Mr. Schomer.

MR. SCHOMER: Your Honor, may the record also reflect that we're here by stipulation of counsel. Waivers of notice of motion and whatever, I assume, are acceptable to the prosecution.

MR. GRANT: That's correct, your Honor.

MR. SCHOMER: John Schomer representing John G. Swainson, along with my associate, James Falahee. We're here for a motion for a continuance in order that we may take an Appeal from a decision which your Honor rendered

yesterday denying our motion to dismiss the indictment in this matter. Your Honor, being familiar with the matters and the questions raised in there, I will not go through them other than to say that it does present a threshold question in a case involving a man who seems to attract a lot of attention, the minute we try to do anything. So it would seem to me that based on the importance of the motion to dismiss and the—the, I think the clear grounds that we have and I think the Court—the Circuit Court, the Court which we intend to Appeal to, would certainly grant our application for leave. I believe that a continuance should be granted. In addition, your Honor, you are aware that as of last Thursday we felt that the case would not proceed to trial. That, in fact, that it would be disposed of without a trial. At that time, we learned that that was not the case. And at that time we submitted our motion to the Court for consideration to dismiss the indictment. So as a result of all these proceedings, and, of course, we received a decision yesterday, we have not really prepared for trial. So in addition to the—the initial threshold question of whether or not the case should go forward at all, I believe there is a clear showing that prejudice would result to the Defendant if we were forced to go to trial on March 4—that's this Friday at 8:00—or 9:30—March 10th, excuse me, your Honor. So I believe that there is an abundance of supporting arguments, information that the continuance should be granted pending the Appeal, your Honor. Thank you.

THE COURT: Thank you. Do you wish to respond, Mr. Grant?

MR. GRANT: Just briefly, if it please the Court. We would object to the continuance and we would like to proceed Friday on the matter. It's been adjourned, I believe two times before. Both times, I believe, by stipulation. If that's not correct, the Court file would correct me. Whatever is reflected in the Court file, I'm sure is the—would be the true dates here. The matters that have been brought up in the Order from the Court here have to do, of course, with being able to pick an impartial jury and proceed without prejudice

to Mr. Swainson because of things that have appeared in the paper, some attributed to me, some I did say, some I didn't say. And, of course, the paper sometimes attributes things that may be incorrect. However, the whole crux of the problem is here, is whether we can pick an impartial jury it would appear. And even the cases that were cited in the brief and in the basis of the Order here, cases cited therein, the cases even where remarks have been made and would seem to be somewhat prejudicial, the cases have been remanded for picking of a new jury. So they can get an impartial jury. And many of those cases—I believe in all of them that I can think of, where it mentions a polygraph, did not come at the time of trial, but came very shortly before the trial, a day before or two days before where things would still be fresh in the juror's minds. The matter that we were concerned with, I believe, took place in January or shortly thereafter. And it's probably been almost a matter of two months before these things—since these things, excuse me, have appeared in the paper. I would contend that we can go ahead and proceed with the trial, at least picking the jury on Friday and see what the situation is concerning what they may remember or what they don't remember. A further adjournment, naturally would be publicized, I'm assuming. I'm aware that the paper knows that the trial is Friday because naturally they called me numerous times asking me if it's going to go. So I'm assuming if there's a further adjournment that that will also be in the paper. And, I suppose as seems to be the habit of the newspaper, then they refresh what's come before. So, I'm not so sure that we're not compounding the problem by not attempting to pick a jury on Friday. But, in fact, going ahead with the Appeal or having the adjournment so the Appeal can be taken, and then we're going to have the additional information put in the paper concerning the very problem which seems to be at the root of the whole situation. I object to the continuance, your Honor, and would suggest that we go ahead and see if we cannot pick the jury on Friday. I don't necessarily insist, and, perhaps a second solution would be simply call off witnesses for Friday and

see if we can't pick a jury. I've made some suggestions to the Court, and Mr. Schomer, I believe, is aware of them, I think I put it in my brief, we've had situations in the Circuit Court where there has been quite a lot of publicity, murder trials and generally where there's been a series of articles. In one case we had last year it was a retrial on a murder case, which came right on the heels of a mistrial. And the procedure that was followed at that time was that rather than having all the jurors in the Court Room hear what an individual juror had to say, we removed ourselves from the Court Room along with that juror and the Court Reporter. And that questions were put to him by the two attorneys, as well as the Judge, in the Judge's chambers, so that anything that he said would not then be added to what may have already been on the mind of the other jurors. And, if he did have something that was prejudicial, then, of course, he could be excused in order to return to the Court Room and no more need be said at that time. So we don't have the problem of all the other potential jurors hearing what the one juror recalls about the case. I—I know there is an additional problem as Mr. Schomer has pointed out concerning the polygraph and the bind that he may be in concerning, you know, can I ask about the polygraph? I think maybe the proper way simply to ask, do you know anything or do you recall hearing anything, reading anything in the newspaper? And can you then be impartial. That seems to be the basis that the law is set on. So I would suggest, perhaps, if we're not as prepared to go ahead with the trial that at least we bring in all the jurors on Friday and, for the record, even there's going to be an appeal, so we know what the situation is with the jurors, whether in fact we can pick six jurors. Or whether, in fact, everybody that comes in, because of the very nature of the Defendant, knows what his situation is. That's what I would suggest to the Court.

THE COURT: Mr. Schomer?

MR. SCHOMER: Your Honor, that totally compounds the problems that we have in this case. Given John Swainson, if we bring him in and we determine that, in fact,

we can't impanel a jury, that really begs the threshold question which the Circuit Court is going to be asked to decide anyway. The newspapers and the media will, in effect, convict him. So that we're playing games here with a man's life over a misdemeanor charge. And I think that a question, the one that we presented to the Court is a Catch 22 situation. We have researched the case. We're—we are, as a matter of right, entitled to inquire of the jury whether or not—and this is during voir dire, they heard of the lie detector statements made by the prosecution, which were eroneous [sic]. And, upon doing that, under Michigan case law, that gives round—that gives rise to a grounds for mistrial. Now, that's the question we're asking the Circuit Court to decide. And I think it's an important threshold question. In defense of my client, I think we can't play games with this man. We have to either put him on trial or don't put him on trial. We can't start picking juries and taking people in the back rooms and whatever. We have to—we have to have a determination on the threshold question of whether or not it's proper to even go forward with the case. So I, you know, I would sincerely ask the Court to grant the continuance so we can resolve this threshold question, which is an important one. How do we select a jury?

THE COURT: Thank you, counselor. Anything further for the record, Mr. Grant?

MR. GRANT: I wasn't suggesting that we take witnesses in the back room and do anything improper. I was just putting that forth to the Court as something that has been done in the past. The cases cited would not seem to indicate that a dismissal would be the proper remedy under any circumstance, your Honor. But simply that sent back for a retrial with a different jury. We might also, I might mention, since the polygraph doesn't seem to be directly involved in the D.U.I.L., it seems to be kind of thrown in here, because, you know, as I say, they rehash the whole situation. If that problem were to come up with the juror that

they recall something, I have no objection that we simply put on the record that the polygraph has nothing to do with the case. If anybody's heard about it, it has nothing to do with the D.U.I.L. case that's before us on Friday. And, no part whatsoever should be played in the jurors mind, one way or another, and I'd go so far as to tell them that there was no polygraph one way or the other offered, rejected or whatever the circumstances are that counsel might wish put to the jury. Because that would seem to be the—the fact of the matter concerning the D.U.I.L. That is not the fact of the matter of the marijuana case. But we're only here on the D.U.I.L. case on Friday.

MR. SCHOMER: Your Honor, that argument is contrary to the Court's present findings. Which cites, First, the Court recognizes while the polygraph matter was involved only in regard to the other charge, resulting sensationalism in the press would have some, if not equal adverse affect on the matter before this Court. So your Honor has really already found contrary to the argument that Mr. Grant has already made.

MR. GRANT: Well, in part, that's why I'm suggesting that, you know, we may instruct the jurors that, you know, if they did hear something of this nature, it really has no relevance here because what they may recall reading in the paper or what they may recall from the article is not the fact of the matter. And, we so inform you at this time.

MR. SCHOMER: That puts us right in the teeth of all the cases we've cited. The burden has been shifted to us.

THE COURT: Granted, counsel. In this particular sort of incident, I think the Prosecutor's opinion and the Court's opinion does not care—carry the same weight that the Defendant's opinion does, because he's the one that has to make a very difficult decision. As to whether the adjournment will cause more publicity, that, again, is the Plaintiff's decision not the People's or the Court's. And, it is his problem, really, not ours. As far as the procedure of selecting a jury could be by stipulation, but, again, that's where I think the Defendant's opinion there should prevail.

And to bring in a jury, even if we don't go to trial, I know we all have more important things to do than that. Also, it would be very possible that jeopardy would set in. And then not be prepared to go to trial. I don't think it would accomplish anything, other than to make it a bigger problem as to the situation than it is right now. I do think the picking of the jury is the problem of the Defendant. But I would go along pretty much with their decisions and agree that they do have a problem. And, as far as I'm concerned, it's too serious of a decision for the Court to force the Defendant to go [to] trial. If they do intend to appeal, I know they—or assume that the purpose of the appeal is an effort to avoid going to trial. If we went to trial, it would have already destroyed the purpose of the appeal. The basis of my decision as stated was that cases of this sort have been remanded, but I don't know of any that have, in fact, been dismissed. So it's pretty close to a case of first instance. My own opinion on that is, if the Court ruled in favor of the Defendant, as I was thinking in my own denial of the motion, then a Defendant with a pretty good P.R. man could very possibly maneuver himself into a situation where he could take advantage of it. I know that didn't happen here. But that would be one of the dangers of the decision. And, I personally wouldn't mind in the least having a higher Court lend it's thinking or wisdom to the decision. But primarily, I personally agree with the objection to a continuance. I do like to terminate matters as soon as we can. There have not been any adjournments before, according to the Court's record, this was originally scheduled for jury trial in line with the Courts already full—it was not delayed as a favor or anything like that to the defense. It was scheduled according to the amount of cases we already had scheduled. As far as this particular motion, the Court entertained the motion as early as possible. And not as soon as promised. And so I do see the problem that gives the Defense on perhaps relying on a favorable ruling, and the position of having to make a decision afterwards of whether or not to appeal it. I don't think the request for adjournment is just a delay thing. I agree, I can see the

problems. We've got a relatively minor offense, but still, I guess, because of the person the Defendant is, in terms of publicity, and in my opinion all out of proportion, but I don't know any way we can avoid that. And I certainly don't deny the press has a right to print what they think is newsworthy. So I am going to grant the adjournment for reason of proceeding to a—appeal the decision I rendered, which was adverse to the defense. As I stated, I gave that serious thought even though it was on a short of term—time as it was, through nobody's fault. I wouldn't mind at all having some higher Court's render their opinions. As I stated, I could not see it grounds for a dismissal outright. And I think the person, regardless of the newspaper publicity, still has to stand trial, somewhere, sometime, somehow. If the higher Courts can come up with any solution to it, I would sure appreciate and welcome their efforts to try it. Should we just adjourn it subject to later notice pending on the results of the appeal? Rather than put a specific date. Does anyone have an objection if we—

MR. GRANT: That would probably be the right way, because sometimes it takes quite a while—

THE COURT: Okay—

MR. GRANT: For the results—

THE COURT: We'll leave it then without trial date subject to setting a trial date on the request of either party.

MR. GRANT: Thank you.

MR. SCHOMER: Thank you, your Honor.

THE COURT: Okay, thank you.

Appendix S

CERTIFICATE

STATE OF MICHIGAN)
) ss.
COUNTY OF JACKSON)

I, Linda J. Iuni, Official Court Recorder in and for the 12th District Court of Michigan, do hereby certify that I made an electronic recording of the proceedings had in the case of:

THE PEOPLE OF THE STATE OF MICHIGAN

-vs-

JOHN GOAD SWAINSON

before the Honorable Robert E. Biewend, District Judge, for the 12th District of Michigan, on March 8, 1978.

I do further certify that the foregoing is a full, true and accurate transcription of the electronic recording made at said time and place.

LINDA J. IUNI
Official Court Recorder
12th District of Michigan

Appendix T

APPENDIX T

JACKSON CITIZEN PATRIOT
June 11, 1978

Swainson trial
Delay studied

Circuit Judge Russell E. Noble has taken under advisement Prosecutor Edward J. Grant's motion to lift a court order delaying the trials of former Gov. John B. Swainson.

Swainson is charged with possession of marijuana and drunk driving. State police arrested him Nov. 16, 1977, in Napoleon Township on the driving charge. A marijuana cigarette was found when Swainson was searched at the Jackson County Jail, police said.

JACKSON CITIZEN PATRIOT
June 5, 1978

Prosecutor to ask judge
to speed up Swainson trial

Jackson County Prosecutor Edward J. Grant says he will ask the courts to lift an order that delays the trials of former Gov. John B. Swainson on charges of possessing marijuana and of drunken driving.

Circuit Judge Russell E. Noble issued the order last week.

Swainson's trial on the marijuana charge was to begin Tuesday before District Judge James Justin. The trial on the drunk driving charge before District Judge Robert Biewend had not been set.

Attorneys for Swainson had asked that both cases be dismissed because of what they termed "erroneous" comments made by Grant concerning the cases.

Both Justin and Biewend denied those motions. Swainson's then asked Noble for permission to appeal the denials, which the judge turned down.

John H. Shomer, who represents Swainson, said Swainson would appeal to the state Court of Appeals. Those appellate plans prompted Noble to issue the order to delay the proceedings before Justin and Biewend.

However, Grant says he'll be back before Noble Friday asking that the delay order be lifted.

"I'd like to try to draw this thing to a head and get it over with," he said. He indicated that, if Noble turns down his request to lift the order, he would ask the Court of Appeals for permission to appeal Noble's decision.

Tuesday's trial was to be held before Justin in a new location, which the judge would not reveal.

He had said he might wait until a day before the trial was to begin before announcing the new location, in order to avoid influencing potential jurors with pretrial publicity.

But, with Noble's delay order, they said all arrangements to hold court in another area have been cancelled. Justin also said his thinking has changed somewhat and that he might announce the new location whenever the trial is rescheduled, a couple of days before it is set to start.

Swainson was arrested Nov. 16 in Napoleon Township by state troopers who charged him with drunken driving. Troopers said Swainson was searched at the county jail and found to be carrying a marijuana cigarette in his suit pocket.

JACKSON CITIZEN PATRIOT
June 1, 1978

Appeal delays
Swainson Trial

An order delaying former Gov. John B. Swainson's trials on charges of possessing marijuana and of drunk driving has been issued by Circuit Judge Russell E. Noble.

Swainson's trial on the marijuana charge before District Judge James Justin had been slated for next Monday (and was recently changed to Tuesday). The trial on the drunk driving charge before District Judge Robert Biewend had not been set.

However, both judges had denied motions that charges in both cases be dismissed because of comments made by county Prosecutor Edward J. Grant after Swainson's arrest last November.

Swainson's attorneys asked the Circuit Court for permission to appeal the denials, which was turned down by Noble. The attorneys then indicated they would appeal to the state Court of Appeals, prompting Noble's order to delay the District Court proceedings pending the outcome of the appeal.

JACKSON CITIZEN PATRIOT
May 30, 1978

Judge mum
on Swainson

By JOHN PIPER
Citizen Patriot Staff Writer

A Jackson District Court judge says he will delay revealing the site of former Gov. John B. Swainson's trial on a marijuana possession charge to protect the defendant's right to a fair trial.

The trial is scheduled to begin next Monday. Swainson was arrested last November.

Judge James Justin of the 13th District Court said today he won't know until Friday exactly when the trial will start, however.

"I intend to make (the location) known in time for someone . . . who wants to be there," Justin said.

He said he has a new location in mind but he explained that final arrangements haven't been made.

Justin agreed to change the venue for the trial after attorneys for Swainson complained that publicity surrounding the case had made it impossible for a fair trial to be held in Jackson.

The reason for withholding information on the new location, he said, is to avoid influencing potential jurors with pretrial publicity.

"This seems the best way to preserve everyone's rights," Justin said.

County Prosecutor Edward J. Grant said he doesn't know where Swainson's trial will be held.

However, Grant said that a one-day notice of the trial's location could pose a hardship for him in lining up witnesses.

Swainson was arrested Nov. 16 in Napoleon Township by state troopers who charged him with drunken driving. Troopers said Swainson was searched at the county jail and found to be carrying a marijuana cigarette in his suit pocket.

Judge Robert Biewend of the 12th District Court will preside over Swainson's trial on the drunken driving charges.

Both judges denied motions that charges in both cases be dismissed because of comments made by Grant to the press after Swainson's arrest.

Swainson's attorneys then asked the Circuit Court for permission to appeal the denials. That was turned down earlier this month by Circuit Judge Russell E. Noble.

Swainson also sought changes of venue in both cases from the Circuit Court, although one was later granted by Justin.

"While the pretrial publicity has been unfortunate, the court cannot rule at this time that the defendant has thereby been deprived of any possibility of a fair trial in either case, whether tried in this county or in such county as the matter may be removed," Noble said in denying the appeal.

An attorney for Swainson, John H. Schomer, said Noble's decision will be appealed to the state Court of Appeals.

Trial on the drunken driving charge has been delayed pending the outcome of that appeal.

JACKSON CITIZEN PATRIOT
March 31, 1978

Swainson trial moved

Former Gov. John B. Swainson has been granted a change of venue for his trial on possession of marijuana charges.

Judge James M. Justin of the 13th District Court agreed to move the trial to a district court in another city to "eliminate even the suggestion of bias in view of the defendant's past and type of publicity that has occurred."

Justin scheduled the trial for June 5, and said the location will be announced before that date.

Swainson's attorneys, in asking for the change of venue, complained that publicity surrounding the case had made it impossible for a fair trial to be achieved in Jackson.

They also asked Justin to reconsider his decision not to dismiss the charges because of what they called erroneous statements made to the press by County Prosecutor Edward J. Grant. Justin denied that request.

John D. Schomer, a Jackson lawyer who is representing Swainson in this case, said Grant should not have told reporters that an earlier adjournment of the trial date was granted so Swainson could take a lie detector test. Schomer said Swainson never agreed to take such a test.

Grant said he went along with the adjournment Jan. 15 because he believed Swainson wanted to take the polygraph. He said it was his duty as a public official to tell why he agreed to the adjournment.

Both Judge Justin and 12th District Judge Robert Biewend, who is hearing Swainson's trial on drunk driving charges, denied motions that charges in both cases be dismissed because of Grant's statements.

Appeals of the decisions have been filed in Circuit Court. The drunk driving trial, originally scheduled for March 10, has been delayed pending the appeal.

Swainson was arrested Nov. 16 in Napoleon Township by state troopers who charged him with drunk driving. At

the county jail, he was searched and troopers said they found a marijuana cigarette in his suit pocket.

JACKSON CITIZEN PATRIOT
March 9, 1978

Swainson Trial Hits Snag

By NOLAN FINLEY
Citizen Patriot Staff Writer

The drunk driving trial of former Gov. John B. Swainson has been adjourned indefinitely while attorneys appeal a district court decision not to dismiss the charges.

Judge Robert Biewend Wednesday denied a motion filed by Swainson's attorneys asking that charges be dismissed on the grounds of erroneous pre-trial publicity.

John H. Schomer, a Jackson attorney representing the former state Supreme Court justice, said he will appeal Judge Biewend's decision to the county Circuit Court.

Swainson was to appear in 12th District Court for trial on the charge Friday morning, but Biewend granted an adjournment pending the outcome of the appeal.

The request for dismissal stemmed from a statement made by Prosecutor Edward J. Grant to the press regarding his offer to give Swainson a lie detector test on possession of marijuana charges.

Swainson was arrested on the dope charge after state police troopers said they found a marijuana cigarette in his suit pocket while searching his clothing at the Jackson County Jail. He was being lodged in the jail Nov. 16 after being arrested for drunk driving in Napoleon Township.

He was set to go to trial on the marijuana charge in 13th District Court Jan. 11, but was granted an adjournment.

Grant told reporters at that time that he agreed to the delay to allow Swainson to take a polygraph test. He also mentioned that if Swainson passed the test, charges against him would be dropped.

Grant told reporters he offered the polygraph test because Swainson claimed publicly that he had no knowledge of the marijuana and that he believed it was placed in his pocket during a visit to a Detroit drug rehabilitation center, where he does consulting work.

Schomer contends that Swainson never agreed to take the polygraph test and Grant should not have mentioned the test publicly.

"We believe our chances of getting a fair and impartial jury are greatly impaired by pre-trial publication of erroneous information," Schomer said.

In Michigan, mention of polygraph tests during trial is grounds for mistrial. The dismissal motion charged that Grant's statements could leave a prospective juror with pre-conceived opinions on why Swainson did not take the polygraph test or lead him to believe Swainson took the test and failed.

Although the objectionable statements concerned the marijuana charge and not the drunk driving charge, Schomer contended and Judge Biewend agreed that the "resulting sensationalism in the press would have some, if not equal, adverse effect on the matter before court.

"However," the judge ruled, "this court cannot conclude that it is probable that potential jurors have been in fact unduly influenced by erroneous statements in the press."

Grant defended his comments.

"I felt I had a duty to the public to explain why I agreed to the adjournment," he said. "I wanted to avoid the assumption that Swainson was receiving special treatment.

"If I weren't under the impression that Swainson was considering the polygraph, I would never have agreed to the adjournment."

Grant said jurors are not likely to be influenced by the newspaper accounts, since they appeared two months ago.

A similar motion for dismissal has been filed in 13th District Court concerning the marijuana charges. Schomer

said he is preparing an appeal of the 12th District Court decision and expects to file it in Circuit Court next week.

THE ANN ARBOR NEWS
March 10, 1978

Swainson To Appeal
Drunk Trial Ruling

JACKSON (AP)—Attorneys for former Gov. John Swainson say they will appeal a judge's ruling that Swainson must stand trial on a drunken driving charge. Swainson lives near Manchester.

Twelfth District Court Judge Robert Bewend on Wednesday denied a defense motion asking that the charge be dismissed on the grounds Swainson could not get a fair trial because of extensive publicity. Bewend did not set a date for the trial, originally scheduled to begin today.

Swainson also faces trial on a charge of marijuana possession in 13th District Court. A similar motion to dismiss is pending there. Trial on that charge is scheduled for some time in April.

He was arrested last November by state police who said he was driving erratically. Troopers said they later found a marijuana cigarette in Swainson's suit pocket during a routine personal search at the jail.

Swainson was governor in 1961 and 1962 and later served on the state Supreme Court before resigning under indictment for bribery conspiracy. Though acquitted of that, he was convicted of lying to a grand jury.

Swainson's attorney, John Schomer of Jackson, argued that a statement to reporters by prosecutor Edward J. Grant had impaired his client's chance of getting a fair and impartial jury.

After Swainson's arraignment on the marijuana charge, Grant said he agreed to an adjournment to allow Swainson time to take a polygraph test, and would drop the charges if Swainson passed.

A polygraph is the so-called "lie detector."

Swainson has said he thinks someone put the cigarette in his pocket while he was working at a drug rehabilition program in Detroit.

Schomer said his client never agreed to take the test and did not ask for the adjournment for that reason. But a potential juror who had read of Grant's statement would conclude either that he had refused to take the test or had failed it, Schomer argued.

STATE JOURNAL
March 10, 1978

Ex-governor to appeal ruling in driving case

Judge won't dismiss Swainson charge

JACKSON (AP)—Attorneys for former Gov. John Swainson say they will appeal a judge's ruling that Swainson must stand trial on a drunken driving charge.

Twelfth District Court Judge Robert Bewend on Wednesday denied a defense motion asking that the charge be dismissed on the grounds Swainson could not get a fair trial because of extensive publicity. Bewend did not set a date for the trial, originally scheduled to begin today.

SWAINSON ALSO faces trial on a charge of marijuana possession in 13th District Court. A similar motion to dismiss is pending there. Trial on that charge is scheduled for sometime in April.

He was arrested last November by state police who said he was driving erratically. Troopers said they later found a marijuana cigarette in Swainson's suit pocket during a routine personal search at the jail.

Swainson of Manchester in Washtenaw County, was governor in 1961 and 1962 and later served on the state Supreme Court before resigning under indictment for bribery conspiracy. Though acquitted of that he was convicted of lying to a grand jury.

SWAINSON'S ATTORNEY, John Schomer of Jackson, argued that a statement to reporters by prosecutor Edward J.

Grant had impaired his client's chance of getting a fair and impartial jury.

After Swainson's arraignment on the marijuana charge, Grant said he agreed to an adjournment to allow Swainson time to take a polygraph test and would drop the charges if Swainson passed.

A polygraph is the so-called "lie detector."

SWAINSON HAS said he thinks someone put the cigarette in his pocket while he was working at a drug rehabilitation program in Detroit.

Schomer said his client never agreed to take the test and did not ask for the adjournment for that reason. But a potential juror who had read of Grant's statement would conclude either that he had refused to take the test or had failed it, Schomer argued.

Grant said Thursday after the judge's ruling he referred to the polygraph because he "wanted to avoid the assumption that Swainson was receiving special treatment" in an adjournment.

"IF I were not under the impression that Swainson was considering the polygraph, I would never have agreed to the adjournment," Grant said.

Regarding possible carryover of publicity about the marijauna case to the drunken driving case, the judge said: "The resulting sensationalism would have some, if not equal, adverse effect on the matter before this court. However, this court cannot conclude that it is probable that potential jurors have been in fact unduly influenced by erroneous statements in the press."

DETROIT FREE PRESS
March 10, 1978

**Swainson is told
to stand trial**

A district judge in Jackson has ruled that former Gov. John Swainson must stand trial on a charge of drunken driving. Swainson's attorney had asked that the charge be thrown out on the ground that pre-trial publicity made a fair trial impossible. The judge did not set a date for the trial, pending an appeal of his ruling. Swainson, who also faces trial on a charge of marijuana possession, was arrested last November by state police who said he was driving eratically [sic]. Troopers said they later found a marijuana cigaret in his suit pocket during a routine personal search at the jail. Swainson was governor in 1961 and 1962 and later served on the state Supreme Court.

THE DETROIT NEWS
March 10, 1978

Long Legal Battle Likely

**Swainson Trial delayed
on drunk driving charge**

JACKSON—Trial of former Michigan Supreme Court Justice John B. Swainson on charges of drunk driving, scheduled to begin today, has been indefinitely adjourned at the request of the one-time Michigan governor's attorney.

Other charges that Swainson had a marijuana cigaret in his jacket pocket, when stopped in his car by State Police on a highway outside of Jackson last fall, are tentatively scheduled for trial next month. No date has been set.

Swainson's attorney, John H. Schomer, and Jackson County Prosecutor Edward J. Grant are locked in a legal battle to determine whether the two cases ever will come to trial.

SCHOMER is claiming that publicity prevents Swainson from getting fair trials and cites certain public statements made by Grant. Grant said he made the statements out of duty to inform the public that Swainson is not getting any special consideration by his office.

This week, 12th District Judge Robert Biewend denied Schomer's motion to dismiss the drunk driving charges because of the publicity, but granted him an adjournment in today's trial to appeal the denial to Jackson Circuit Court.

Grant, who won that legal round, says he will appeal to the Michigan Court of Appeals if the circuit court rules in favor of Swainson.

Also this week, Schomer filed a dismissal motion in the other Jackson district court, the 13th, where the drug charge is being considered. Trial on the drug charge already has been adjourned once at Schomer's request. That was last Jan. 11.

After that adjournment, Grant said he agreed to the delay to permit Swainson to take a lie test. He said Swainson wanted to demonstrate his contention that the marijuana cigaret was not his, but rather inserted into his pocket by someone during Swainson's visits to a Detroit drug rehabilitation center for the purpose of encouraging adicts [sic] to reform.

SCHOMER says the statement was wrong because Swainson never agreed to take a lie test. Grant said he made the statement "under the impression" that Swainson was going to. Grant said he would have agreed to drop the charge had Swainson passed the test.

Schomer said the pretrial publicity was "erroneous" and would prejudice a jury in the drug and drunk driving cases.

Swainson's car was stopped the night of Nov. 16 on M-50 in Napoleon Township. Swainson was driving home to Manchester, which is near Ann Arbor, after spending an evening in Lansing with associates on the anniversary date of the World War II incident in which he lost both legs to a land mine in France.

Once the boy wonder of Michigan Democratic politics, Swainson after the war was elected to the state Senate from the Detroit suburb of Plymouth. He served as majority leader and lieutenant governor before being elected governor in 1960.

Subsequently, Swainson served on the Wayne Circuit bench and was elected to the Supreme Court. He resigned the high court post in 1975 after conviction in Detroit Federal Court of lying to a federal grand jury.

Supreme Court, U. S.
FILED
SEP 28 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

NO. 79-334
October Term, 1979

JOHN G. SWAINSON,
Petitioner,

-VS-

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR RESPONDENT

EDWARD J. GRANT
Prosecuting Attorney
County of Jackson, Michigan
Attorney for Respondent

By: JOHN L. WILDEBOER
Assistant Prosecuting Attorney
300 County Court Bldg.
312 South Jackson
Jackson, Michigan 49201
Telephone: (517) 788-4283

AMERICAN PRINTING COMPANY
125 WEALTHY STREET, S.E., GRAND RAPIDS, MICHIGAN 49503 — (616) 458-5326
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES ii
QUESTION PRESENTED 1
STATEMENT OF THE CASE 1
ARGUMENT 3
APPENDIX A 1a

INDEX OF AUTHORITIES

Cases: Page

Baker, People v, 7 Michigan App 471; 152 NW2d 43 (1967) 7

Collins, People v, 43 Mich App 259; 204 NW2d 290 (1972) 6

Davis, People v, 53 Mich App 94; 218 NW2d 787, cert den 419 US 1080; 42 L Ed 2d 674 (1974) 7

Eddington, People v, 77 Mich App 177; 258 NW2d 183 (1977) 6

Estes v *Texas*, 381 US 532; 14 L Ed 2d 543; 85 S Ct 1628 (1965) 11, 12

Green, People v, 74 Mich App 351; 253 NW2d 763 (1977) 12

Ernest Green, People v, 405 Mich 273; 274 NW2d 448 (1979) 10

Green, People v, *323 Mich 128; NW2d 142 (1948)* 7

Hawthorne, People v, 293 Mich 15; 291 NW 205 (1940) 12

Irvin v *Dowd*, 366 US 717; 81 S Ct 1639; 6 L Ed 2d 751 (1961) 5, 6, 11, 12

Nard, People v, 78 Mich App 365; 260 NW2d 98 (1977) 6

Parker, People v, 76 Mich App 432; 257 NW2d 109 (1977) 12

Quimby, People v, 134 Mich 625; 96 NW 1061 (1903) .. 6

Raines, People v, 63 Mich App 498; 234 NW2d 673 (1975) . 6, 7

Rideau v *Louisiana*, 373 US 723; 10 L Ed 2d 663; 83 S Ct 1417 (1963).....11, 12

Schneider, People v, 309 Mich 158; 14 NW2d 819 (1944) 6

Sponick v *Detroit Police Dept*, 49 Mich App 162; 211 NW2d 674 (1973) 8

Stockard, People v, 48 Mich App 680; 211 NW2d 62 (1973) 6

Stroble v *California*, 343 US 181; 96 L Ed 872; 72 S Ct 599 (1952) 11

Swift, People v, 172 Mich 473; 138 NW 662 (1912) 6

Turner v *Louisiana*, 379 US 466; 13 L Ed 2d 424; 85 S Ct 546 (1965)..... 11

INDEX OF AUTHORITIES (CONT'D)

Cases: Page

Whitfield, People v, 58 Mich App 585; 228 NW2d 475 (1975) 7

Statutes:

MCL 257.625; MSA 9.2325 3

MCL 335.341(4)(d); MSA 18.1070(41)(4)(d) 4

MCL 600.8119; MSA 27A.8119 4

QUESTIONS PRESENTED

Is Petitioner entitled to dismissal of pending charges of driving under the influence of intoxicating liquor in the 12th District Court and possession of marijuana in the 13th District Court based on pre-trial publicity arising from the Prosecutor's statement to a newspaper reporter that the marijuana case had been adjourned for Petitioner to consider an offered polygraph exam, which was reported in the newspaper as the Petitioner having agreed to take a polygraph, where there has been no attempt made to select a jury or determine if an impartial jury could be selected, where a year and a half has elapsed since the publicity, and where the 13th District Court has granted a change of venue in the marijuana trial?

STATEMENT OF THE CASE

On November 16, 1977, Petitioner was stopped by two Michigan State Police officers about ten miles from his home. After stopping Petitioner, the officers determined that the Petitioner was intoxicated and arrested him for the offense of driving under the influence of liquor (DUIL). Petitioner was then taken to the Jackson County Jail where he was immediately subjected to a search which turned up a marijuana cigarette. The Petitioner was charged in the 12th District Court with the offense of DUIL and in the 13th District Court with possession of marijuana.

Petitioner's arrrest attracted much attention in the newspapers and on radio and television due to his status as a former Governor of the State and former State Supreme Court Justice. Included in this publicity were portions of interviews Petitioner granted to various reporters. In these interviews, Petitioner acknowledged that he had been drinking before he was stopped but denied that he was driving in an intoxicated condition. Petitioner reported that he has two artificial legs, the result of a World War II injury, and that in getting out of the car he may have stumbled or lurched due to his aritificial legs which may have led the officers to believe that he was intoxicated.

(Petitioner's appendices H, I, J). In these interviews, Petitioner also indicated that he was a consultant for a drug rehabilitation center, that he had been at the center several days prior to being stopped by the officers, and that somebody might have slipped the marijuana cigarette in his pocket to get rid of it. Otherwise, the Petitioner stated that he had no idea how the marijuana got in his pocket. (Petitioner's appendices H, I, J, K). During this early publicity recounted in Petitioner's appendices, no statements are attributed to the prosecutor, and only Lt. Garrison, Commander of the Jackson State Police Post, is attributed with saying that Petitioner was observed driving very slowly and weaving back and forth across the center line, was observed to be intoxicated, and found to be in possession of a marijuana cigarette when he was brought to the jail. Garrison is also attributed with saying that the Petitioner behaved like a perfect gentleman and never tried to use his influence.

The publicity concerning a polygraph examination began on January 11, 1978, and continued up to March 31, 1978 (Petitioner's appendices N, O, R, T). The newspaper accounts indicate that Prosecutor Grant stated that selection of the jury in the marijuana case was adjourned to allow Petitioner to take a lie detector test.

Prosecutor Grant's account of the statement he made to a newspaper reporter indicates that a reporter from the local Jackson paper inquired as to the reason for the adjournment of the marijuana case and was told by Grant that a polygraph had been offered in the marijuana case based on Petitioner's claim of having no knowledge of the substance. The prosecutor stated that he did not indicate to the reporter that Petitioner had agreed to take the polygraph test. (Respondent's appendix A).

Petitioner filed in both the 12th and 13th District Courts separate motions to dismiss the complaints. On March 7, 1978, Judge Biewend of the 12th District Court issued an order denying Petitioner's motion to dismiss the complaint. On March 28, 1978, Judge Justin of the 13th District Court entered an order denying Petitioner's motion to dismiss the complaint but, at the

same time, granted Petitioner's motion for change of venue. On April 11, 1978, Petitioner filed an application for leave to appeal to the Circuit Court for the County of Jackson from the orders denying Petitioner's motion to dismiss the charges in the 12th and 13th District Courts.

On May 30, 1978, Judge Noble of the Circuit Court for the County of Jackson issued an order denying Petitioner's application for leave to appeal in each case.

Petitioner made application for leave to appeal to the Michigan Court of Appeals and by an order certified July 28, 1978, the Court of Appeals denied Petitioner's application.

Petitioner then made application for leave to appeal to the Michigan Supreme Court and that Court by an order certified April 6, 1979 denied Petitioner's application for leave to appeal. Petitioner applied for rehearing before the Michigan Supreme Court and by an order certified June 5, 1979 the Michigan Supreme Court denied Petitioner's motion for rehearing.

ARGUMENT

THE DISMISSAL OF CHARGES BASED ON PRE-TRIAL PUBLICITY IS AN IMPROPER REMEDY WHEN THERE HAS BEEN NO ATTEMPT TO SELECT A JURY OR TO DETERMINE THE TAINT TO PROSPECTIVE JURORS. IMPROPER PUBLICITY DUE TO A PROSECUTOR'S STATEMENT HAS NOT BEEN RECOGNIZED AS CALLING FOR THE REMEDY OF DISMISSAL; RATHER, AN ATTEMPT TO SELECT AN IMPARTIAL JURY IS STILL REQUIRED BEFORE ANY FURTHER REMEDY IS TO BE CONSIDERED.

INTRODUCTION

Petitioner presently has pending a driving under the influence of intoxicating liquor (DUIL) charge, MCL 257.625; MSA 9.2325, in 12th District Court and a possession of marijuana

charge, MCL 335.341(4)(d); MSA 18.1070(41)(4)(d), in the 13th District Court. The 13th District Court consists of the City of Jackson, and the 12th District consists of the County of Jackson except the City of Jackson, MCL 600.8119; MSA 27A.8119. The Petitioner was initially arrested for the offense of DUIL in the County of Jackson with venue laid in the 12th District Court. The Petitioner was then taken by the arresting officers to the Jackson County Jail, located in the City of Jackson, where he was to have been lodged. At the jail, the Petitioner was searched, and a marijuana cigarette was found in his coat pocket. Thus, venue for the possession of marijuana charge was laid in the 13th District Court.

Petitioner, on appeal to the Fourth Judicial Circuit Court of Michigan, the Michigan Court of Appeals and the Michigan Supreme Court, and in his petition for writ of certiorari, has pursued an appeal from the 12th District Court and the 13th District Court on a consolidated basis, and addressed the issues as if there were only one proceeding against the Petitioner. Due to the substantial difference in the two different charges pending against the Petitioner in the two different District Courts, the different impact which the pre-trial publicity would have on the two charges, and the different remedies sought and relief obtained by the Petitioner in the different District Courts, this Court must recognize that it is faced with two distinct issues, the resolution of each dependent on the facts and circumstances of each case.

Petitioner initially brought a motion to dismiss the complaint both in the marijuana case in 13th District Court and the DUIL case in 12th District Court. Petitioner cited pre-trial publicity of two natures as the basis for his motions to dismiss in District Court. The first consists of newspaper and radio publicity concerning the charges which is attributable to the Petitioner's status as a public figure. The second form of publicity concerns newspaper reports that the Petitioner was to submit to a polygraph test on the marijuana case in the 13th District Court, and later reports that the Petitioner had not submitted to the test and that the prosecutor would go ahead

and try the Petitioner on the marijuana charge if he would not submit to the polygraph.

Petitioner's motion to dismiss was denied by the 12th District Court on March 7, 1978 and by the 13th District Court on March 28, 1978. Petitioner also brought a motion for change of venue in 13th District Court which was granted by that Court on March 28, 1978. Petitioner has not moved for a change of venue in 12th District Court.

THE REMEDY OF DISMISSAL FOR PRE-TRIAL PUBLICITY IS NOT AVAILABLE.

It is Petitioner's assertion that due to the nature of the publicity, it would be impossible to impanel an impartial jury and, therefore, the charges against him must be dismissed.

Petitioner has been unable to cite any case in which the remedy for pre-trial, or trial publicity, was to dismiss the charge against the defendant, regardless of the source of that publicity. Research by the undersigned has also failed to uncover a case where the remedy of dismissal for pre-trial publicity was used, suggested or approved.

The Respondent realizes that there has been far greater publicity in the instant case than normally attends a DUIL or possession of marijuana trial. The Respondent also realizes that it is conceivable that some of this publicity may result in potential jurors forming an impression or an opinion of the case. Beyond this point, however, assertions concerning the exact nature of the impact of this publicity on prospective jurors, such as the Petitioner has engaged in, amounts to pure speculation. It has been repeatedly held that a juror's knowledge of the case, or formation of an opinion concerning the case, is not sufficient to disqualify the juror. In *Irvin* v *Dowd*, 366 US 717; 81 S Ct 1639; 6 L Ed 2d 751 (1961), this Court stated:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a

> prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

This same principle has been recognized in Michigan courts. *People* v *Quimby*, 134 Mich 625; 96 NW 1061 (1903), *People* v *Raines*, 63 Mich App 498; 234 NW2d 673 (1975).

Petitioner has also failed to make any showing that this case involves strong community feeling or bias as a result of the publicity which would inherently taint the jury selection process. Without such a showing, a change of venue, much less a dismissal, is not warranted. *Irvin* v *Dowd*, supra, *People* v *Schneider*, 309 Mich 158; 14 NW2d 819 (1944).

The procedure accepted by Michigan appellate courts as the better rule where there is a question of the necessity of a change of venue due to pre-trial publicity is to reserve a decision on the issue of change of venue until an attempt has been made to obtain a fair and impartial jury. *People* v *Schneider*, supra, *People* v *Swift*, 172 Mich 473; 138 NW 662 (1912); *People* v *Eddington*, 77 Mich App 177; 258 NW2d 183 (1977). To shield prospective jurors who have not been exposed to the polygraph publicity from mention or discussion of that subject on *voir dire* of other jurors, the trial court could *voir dire* prospective jurors individually. *People* v *Collins*, 43 Mich App 259; 204 NW2d 290 (1972). Another alternative remedy short of an attempt to select an impartial jury would be to hold an evidentiary hearing to determine the extent and nature of any prejudice arising from the pre-trial publicity. *People* v *Nard*, 78 Mich App 365; 260 NW2d 98 (1977), *People* v *Stockard*, 48 Mich App 680; 211 NW2d 62 (1973).

PUBLICITY CONCERNING A POLYGRAPH EXAMINATION DOES NOT BAR SELECTION OF A JURY.

Petitioner's assertions that it would be impossible to select an impartial jury due to the prejudice caused by publicity concerning a polygraph examination and an increase in the prejudice if the Petitioner had to *voir dire* prospective jurors on the issue of the polygraph examination is unfounded. In the first instance, it should be noted that the publicity surrounding the polygraph examination has been made in connection with the marijuana case in 13th District Court, and not the DUIL case in 12th District Court. As concerns the DUIL case in 12th District Court, if a prospective juror had been exposed to the publicity concerning the polygraph examination, that juror could certainly be educated that a charge of DUIL involves the physical capacity of an individual to operate a motor vehicle, and the submission to a polygraph test on a DUIL charge could serve absolutely no purpose. This distinction does not call for a juror of uncommon sophistication. If, during *voir dire* the trial court should determine that the prospective jurors could not separate the DUIL charge from the publicity concerning a polygraph in the connected charge in 13th District Court, then it would be his place to find that an unprejudiced jury could not be impaneled in Jackson County. It would be premature for this Court to make that determination without any evidence of record to support such a determination.

As concerns the possession of marijuana charge in 13th District Court, the Respondent asserts that inquiry during *voir dire* regarding a juror's exposure to publicity concerning a polygraph would not so anathematize the proceedings as to prevent the selection of a jury. Exposure of a jury to mention of a polygraph examination in connection with pending criminal charges does not automatically result in prejudice. It has been recognized that a jury can, to a certain extent, be exposed to information of this nature, without violating the defendant's right to due process of law. *People* v *Green*, 74 Mich App 351; 253 NW2d 763 (1977), *People* v *Raines*, supra, *People* v *Whitfield*, 58 Mich App 585; 228 NW2d 475 (1975), *People* v *Davis*, 53 Mich App 94; 218 NW2d 787, cert den 419 US 1080; 95 S Ct 670; 42 L Ed 2d 674 (1974), *People* v *Baker*, 7 Mich App 471; 152 NW2d 43 (1967). It cannot be assumed that a juror would be unable to render an impartial verdict merely because he was questioned concerning his exposure to publicity about a polyg-

raph examination. It remains within the discretion of the trial court to determine whether the *voir dire* concerning the polygraph has such an impact on potential jurors as to impair the jurors' fair and independent judgment.

The Petitioner's sought after remedy of outright dismissal based on pre-trial publicity is of necessity dependent on the premises that mention of a polygraph to prospective jurors is so inflammatory as to render jurors incapable of arriving at an impartial verdict thereafter, and that jurors accept without reservation the accuracy of polygraph examination results and believe that refusal to submit to a polygraph constitutes an admission of guilt. Respondent contends that Petitioner's portrayal of the impact on a juror of the polygraph publicity has been vastly overstated, but again notes that an accurate determination of this impact on the jurors in the 13th Judicial District of Michigan can only be made in a survey of those jurors, either on *voir dire* or at an evidentiary hearing.

At least one panel of the Michigan Court of Appeals has accepted the view that knowledge of a polygraph examination is not so overwhelming as to prevent a factfinder from making its own independent determination of a witness's credibility. The Michigan Court of Appeals in *Sponick* v *Detroit Police Dept*, 49 Mich App 162; 211 NW2d 674 (1973) considered the introduction into evidence, on the police officer's motion, of the results of a polygraph examination at the police officer's hearings before a Detroit Police Department trial board. In addressing the police officer's contentions that the trial board's findings were arbitrary since they were contrary to the results of the polygraph examinations, the Court of Appeals stated:

> The results of a polygraph examination are, in reality, the examiner's expert opinion as to the veracity of the individual examined by him. * * * It cannot be seriously claimed that non-experts are incompetent to judge veracity or credibility. Our jury system is grounded on the principle that all unbiased adults are competent to judge credibility. Therefore, the members of appellants' trial boards, although not polygraph experts, were competent, having heard all the testimony and seen appellants testify, to interpose their own conclusions of appellants' credibility against the opinions of the polygraph experts who testified for appellants. Accordingly . . . it is our conclusion that appellants' trial boards did not act arbitrarily and capriciously . . . when they chose not to accept as conclusive the results of polygraph examinations to which appellants submitted. (49 Mich App at 190-191; 211 NW2d at 687).

It is not inconceivable that the District Courts in surveying veniremen would find some who share Senator Ervin's view of the polygraph as modern day witchcraft. Such a juror, rather than being swept away by the publicity may view newspaper accounts of the prosecutor's offer of a polygraph test as heavy handed badgering of the defendant and take a jaundiced view of the entire prosecution. Without attempting to seat a jury, this position remains as speculative as Petitioner's presumption of prejudice, yet does serve to illustrate the possibility of a not unsizeable portion of prospective jurors possessing a healthy distrust of the efficacy of a polygraph examination and those, regardless of their view of the polygraph, capable of reaching an independent conclusion of a witness's veracity and credibility.

THE PROSECUTOR'S MENTION OF A POLYGRAPH DOES NOT CHANGE THE AVAILABLE RELIEF.

Petitioner intimates that the extremely unusual remedy of dismissal based on pre-trial publicity should be warranted since it was the Respondent who was named in the newspapers as the source of information that the Petitioner was intending to submit a polygraph examination. Petitioner suggests that if these newspaper accounts were accurate the Respondent would have violated Disciplinary Rule 7-107 of the Michigan Code of Professional Responsibility Concerning Trial Publicity and, thus, a new type of exclusionary rule should be formed based on the Respondent's breach of the code of professional responsibility. The Michigan Supreme Court has expressly

rejected this argument. In *People* v *Ernest Green*, 405 Mich 273; 274 NW2d 448 (1979) the Michigan Supreme Court noted:

> This argument rests upon a basic misconception of the code of professional responsibility. The provisions of the code are not constitutional or statutory rights guaranteed to individual persons. They are instead self imposed internal regulations prescribing the standards of conduct for members of the bar.
>
> * * *
>
> Few courts have mixed the standard of conduct found in DR 7-104(A)(1) or any other provision of a code of professional responsibility into questions concerning the admissibility of evidence in criminal or civil cases. Even the courts which have embraced this novel concept have linked their decisions to do so with constitutional doctrines or statutory provisions not recognized or present in Michigan jurisprudence. See, for example, *People* v *Hobson*, 39 NY2d 479; 348 NW2d 894; 384 NYS2d 419 (1976). (405 Mich at 293, 294; 274 NW2d at 454).

Thus, the question of an attorneys' conduct, and the remedy for pre-trial publicity remain distinct issues. The fact that the Respondent added to the publicity already attendant to this case does not alter or add to the well established remedies available to avoid prejudice from pre-trial publicity. The creation of the novel remedy of dismissal before any attempt to select a jury would of necessity be based on equitable grounds. Petitioner, however, due to the favorable publicity he created for himself in his interviews with the press has not come into court with clean hands and should not be entitled to the unprecedented relief requested.

PETITIONER'S SPECULATIVE POSSIBILITY OF PREJUDICE DOES NOT OUTWEIGH INDICATIONS THAT A FAIR AND IMPARTIAL JURY CAN BE SELECTED.

The Petitioner's assertion that the mere possibility of prejudice from pre-trial publicity should warrant dismissal is erroneous. The Petitioner cites *Estes* v *Texas*, 381 US 532; 14 L Ed 2d 543; 85 S Ct 1628 (1965) for this proposition. The Supreme Court in *Estes*, however, notes that the "no prejudice" rule is applied only in extremely unusual situations. The Court refers to the general rule found in *Irvin* v *Dowd*, supra, and *Stroble* v *California*, 343 US 181; 96 L Ed 872; 72 S Ct 599 (1952), where a careful examination of the facts was made to determine whether prejudice actually resulted from trial publicity. The narrow holding of the *Estes* decision is that the defendant was deprived due process of law by the televising and broadcasting of his trial. In so holding, the Supreme Court noted:

> Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced. (381 US at 544, 14 L Ed 2d at 551).

Estes holds that most cases involving a claim of deprivation of due process require a showing of identifiable prejudice to the accused. Only where a procedure used involves such a probability that prejudice will result is it deemed inherently lacking in due process. Similar cases are *Rideau* v *Louisiana*, 373 US 723; 10 L Ed 2d 663; 83 S Ct 1417 (1963), which involve the televising of the defendant in the act of confessing to a crime and *Turner* v *Louisiana*, 379 US 466; 13 L Ed 2d 424; 85 S Ct 546 (1965), where deputy sheriffs who were witnesses in the trial were also assigned duty as keepers of the jury. In the instant case, the publicity surrounding the charges is not of such a nature as to render any trial inherently lacking in due process.

In *Irvin* v *Dowd*, supra, this Court noted a deep and bitter prejudice present throughout the community as reflected in the *voir dire* examination of the jurors finally selected. The instant case, however, has not progressed far enough to be comparable to *Irvin* v *Dowd*, supra, since there has been no determination of the actual impact of publicity on prospective jurors. In any event, the remedy resorted to in *Estes*, *Rideau* and *Irvin* was a change of venue, and not an outright dismissal of charges as urged by the Petitioner in the instant case.

The Michigan Court of Appeals in ruling on a case where a number of impaneled jurors were exposed to prejudicial newspapers articles set down the appropriate rule for the instant case when it stated:

> . . . .a showing of mere potential for prejudice is insufficient to warrant granting a mistrial. (76 Mich App at 408)

People v *Parker*, 76 Mich App 432; 257 NW2d 109 (1977). See also *People* v *Green*, 323 Mich 128; 35 NW2d 142 (1948), *People* v *Hawthorne*, 293 Mich 15; 291 NW 205 (1940). That rule, applicable to impaneled jurors, would also be applicable to prospective jurors in the instant case.

Finally, Petitioner recognizes at page thirty-one of his petition that a change of venue or a continuance are available remedies for pre-trial publicity. It should be noted that appendices G through O and R and T which are newspaper accounts concerning the instant case, span the dates of November 16, 1977 to June 11, 1978. Those articles containing some mention of the polygraph examination span January 18, 1978 through March 31, 1978. (Petitioner's appendices N, O, R, T). Thus, one remedy has already been created by Petitioner's interlocutory appeal. One year and ten months have now elapsed since Petitioner's arrest. One year and six months have now elapsed since the newspapers last concerned themselves with mention of the polygraph. Further, it must be noted from Petitioner's appendices that the publicity concerning the polygraph, and the publicity preceding mention of the polygraph, include several exculpatory statements made by the Petitioner to newspaper reporters, and statements by Petitioner's attorney that there had never been an agreement to take a polygraph test. Thus, the newspaper articles presented in Petitioner's appendices are not entirely adverse or prejudicial. Some of the publicity can be seen as having a favorable impact on jurors, and Petitioner's published comments can be seen as tempering the suggestion in earlier articles that Petitioner agreed to, but then backed out of a polygraph exam.

Thus, the favorable aspects of the publicity, the lapse of time which has not occured since the main body of publicity, and the change of venue already granted by the 13th District Court in the marijuana case all support the assertion that an impartial and unbiased jury can be selected at this date.

CONCLUSION

For the foregoing reasons the Respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

EDWARD J. GRANT
Prosecuting Attorney
Jackson County, Michigan
Attorney for Respondent

By: (s) JOHN L. WILDEBOER
Assistant Prosecuting Attorney
300 County Court Building
312 South Jackson Street
Jackson, Michigan 49201
Telephone: (517) 788-4283

Dated: September 14, 1979

APPENDIX A

Answer to Motion to Dismiss Indictment

STATE OF MICHIGAN
IN THE DISTRICT COURT
FOR THE COUNTY OF JACKSON

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

-VS- File No.

JOHN G. SWAINSON,
Defendant.

Edward J. Grant (P14272)
Attorney for Plaintiff

John H. Schomer (P20051)
Attorney for Defendant

ANSWER TO MOTION TO DISMISS INDICTMENT

NOW COMES Edward J. Grant, Prosecuting Attorney for the County of Jackson, State of Michigan, and in Answer to Defendant's Motion To Dismiss Indictment states:

1. When approached for an adjournment of the marihuana case scheduled before the 13th District Court, the Prosecutor stipulated thereto based in large part upon the agreement that Defendant would consider taking a polygraph test concerning knowledge of the marihuana found in his pants pocket. Defendant's position as reported in the newspapers being that he was unaware that this item was in his pocket.

2. A reporter from the Citizen Patriot inquired as to the reason for the adjournment and was informed that a polygraph had been offered in the marihuana case based upon Defendant's claim of having no knowledge of the substance. It was

not indicated that Defendant would take the offered polygraph as no answer had been received at that time. After the story was published, the answer was received by the Defendant. The refusal was not communicated to the reporter.

3. The effect of the newspaper articles and other media coverage, which obviously from a reading of exhibits attached to Defendant's Motion included several statements from the Defendant including the statement that he was refused a breathalyzer test, have not been shown to irremediably deny Defendant due process or the right to a presumption of innocence or a fair trial before an impartial jury. No jury has yet been attempted to be picked in either cases pending. The reports appeared some time ago and many potential jurors in all probability will not remember what, if anything, they read or will be able to base their verdict solely upon the testimony given in court.

4. An additional consideration would of course be for a change of venue if an impartial jury could not be selected in these matters.

5. Additionally, it is quite clear from the exhibits that any polygraph examination would only affect the marihuana charge and would have nothing to do with the DUIL charge. The only comments concerning the DUIL have been made by the Defendant, some being highly predjudicial to the Plaintiff. Defendant should not be allowed to benefit from his own statements to the media by now claiming because of such publicity he cannot obtain a fair trial.

WHEREFORE, Plaintiff respectfully moves this Honorable Court to deny Defendant's Motion To Dismiss Indictment.

Respectfully submitted,
(s) EDWARD J. GRANT
Prosecuting Attorney
300 County Courthouse
Jackson, Michigan 49201

Dated: March 3, 1978